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Cases in the Court of Appeals of the Sta



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law

COURT OF APPEALS

OF THE

STATE OF NEW-YORK.

CONTAINING

A STATEMENT OF EACH CASE ARGUED IN THE COURT,

COMMENCING WITH ITS ORGANIZATION ;

THE BRIEFS AND POINTS OF COUNSEL THEREIN,

THE DECISION OF THE COURT,

AND THE

VOTES OF THE JUDGES

UPON THE RESPECTIVE DECISIONS.

With Notes and References

BY

NATHAN HOWARD, JR.,

COUNSELLOR-AT-LAW.

VOL. I.

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Entered according to act of Congress, in the year one thousand eight hundred
and fifty-five,

By NATHAN HOWARD, JR., Esq.,

in the Clerk's office of the District Court of the Southern District of New-York.



NAMES OF JUDGES.

THE COURT OF APPEALS, organized under the amended constitution of 1846, and the judiciary act of 1847, at the Capitol, in the city of Albany, on the first Monday (5th) of July, 1847.

The four justices of the supreme court, having the shortest term to serve in the first, third, fifth and seventh judicial districts, were designated, by law, as judges *ex officio* of the court of appeals.

The court, as organized, which remained unchanged until the first day of January, 1849, was composed of the following eight judges :

FREEBORN G. JEWETT, *CHIEF JUDGE, Skaneateles, Onondaga County.*

GREENE C. BRONSON, *City and County of Albany.*

CHARLES H. RUGGLES, *Poughkeepsie, Dutchess County.*

ADDISON GARDINER, *Rochester, Monroe County.*

FROM SUPREME COURT.

SAMUEL JONES, *City and County of New-York.*

WILLIAM B. WRIGHT, *Monticello, Sullivan County.*

CHARLES GRAY, *Herkimer, Herkimer County.*

THOMAS A. JOHNSON, *Corning, Steuben County.*

P R E F A C E.

IN presenting this work to the profession, it may not be inappropriate, perhaps, to go back a little and give some of the circumstances which led to its production ; as, also, those which induced the publication of the *Special Term* (now *Practice Reports*).

For *twenty-two years* of my life, it has fallen to my lot to act as *Clerk of Courts* : commencing in 1827, (when quite young,) with the clerk of Rensselaer County, Troy, New-York, under the direction of a good lawyer, and an excellent, well-disciplined clerk—Hon. ARCHIBALD BULL, afterwards judge of that county—I was placed as clerk of the *Circuit and Oyer and Terminer, Common Pleas and General Sessions, and Troy Mayor's Court*, where, during the rough and smooth (if any) of litigation in those courts, I remained eleven years. In January, 1839, I was admitted as attorney and counsellor at law of the Supreme Court, and solicitor and counsellor in Chancery, and entered upon the practice of the law, in which I continued for about three years.

In 1842, I was called to act as clerk of the general and special terms of the late *Supreme Court*, at Albany—Hon. SAMUEL

NELSON, Chief Justice, Hon. GREENE C. BRONSON and Hon. ESEK COWEN, Justices. In that capacity, I remained until July, 1847, when the courts in the state were organized under the amended constitution of 1846; and when, by a rather natural selection, perhaps, I was appointed to act as the clerk (in court) of the *Court of Appeals*; where I remained until the first day of January, 1854, when I retired from official duties.

It was during my official services in the special terms of the Supreme Court, that I discovered the want of the Special Term Reports; and in the fall of 1844, I issued the first number of that work. That I did not misjudge as to the necessity of those reports, may be fairly inferred, I think, from the universality with which they were taken by the profession: and since the new organization of the courts, and under the Code, the value and circulation of these reports have largely increased. As a true and faithful reporter can have very little vanity to gratify in recommending his reports—the materials and merits of which belong to others (the judges)—I think I may safely assert that “*Howard’s Practice Reports*” have increased in interest and value, at every successive volume, since their publication commenced.

It was during my clerkship in the Court of Appeals, that the present work was suggested; and it occurred something after this manner: counsel, attending court, would frequently call on me, and say,—“Howard, can’t you save me an extra copy of the *cases and points* in the causes argued here? They would be very useful to me.” The frequent reiteration of this, or a similar question, and my inability to comply with the request—as there were generally presented to the clerk only those cases and points required by the rules of the court—led me to reflect upon the matter, and to devise some method and form in which they could be put in order, to make them avail-

able and serviceable to the profession. And the result has been the book here presented, comprising the first volume.

Of course, the work cannot be considered as *Reports* of the court; for the very good reason, that the principal elements which constitute the reports, are wanting, viz. : the *opinions* of the court. There are, occasionally, opinions of judges published, whether prevailing or dissenting, in cases which have never been reported; but they are published as a part of the history and discussion of the case, and will be, undoubtedly, entitled to their due weight and authority. The work might be styled the *Reports of Counsel*; or, more properly, perhaps, a "*Book of Briefs*." It is in fact, however, simply what its title indicates, "Cases, Points, &c., in the Court of Appeals."

The head note—"Questions discussed"—is formed by analyzing the case and points on each side, so as to present the *principal questions* raised and argued, which usually do not exceed three or four in each case. A *statement* or *abstract of the case* is then made, adapted to the questions discussed, and more or less full, to meet the nature of the subject—whether *exceptions, raising points of law, or pleading, or evidence*. Then follow the *points and authorities* of the respective *counsel*, (*attorneys'* names also given,) with the addition of Judge BRONSON'S *notes of argument*, and *corrected* and *additional authorities* cited on the argument. Next, the *decision* of the court, and the *vote of the judges*. And lastly, a *foot note*, stating the *grounds* upon which the court have disposed of the cause.

It is well known to every lawyer, that in every case carried to the court of last resort, *every point* which possibly can be conceived to be material, is raised and discussed; and that, in almost every case which is reported, there are questions raised and discussed on the argument, which do not appear in the report of the case. And, it is not because the case is not well

reported ; but, because it is the usual and customary practice of courts, in deciding a cause, where they can, to rest their decision and opinions upon one clear, full point, which goes to the whole cause of action, or ground of defence, and not to say anything respecting the others. And these points, (with their authorities,) which are not decided, may be of vast importance in another case, where a different state of facts and other circumstances are well adapted for their application ; and, if readily at hand, would save much examination and labor. Take, for instance, as an illustration, the case of *Wood* agt. *Weiant and others*, on page 155, and *Mattison* agt. *Baucus*, on page 639, as being more prominent, perhaps, in these respects, than some others.

A number of the cases contained in this volume, never have been reported ; probably because, involving some familiar principle of law or equity, or containing merely questions of evidence, it was deemed not necessary ; but the *briefs* of counsel in those cases may contain points, suggestions and authorities, very important.

How often is it, in a reported case which bears closely, but not decisively, upon a question which a counsellor or a judge has under examination, does his meditations run on this wise : “ I wish I knew the exact ground the counsel took in that case, and the authorities cited ? ” And in similar ways, the utility of this work might be illustrated. But as every lawyer knows the value of his own labor in these matters, he is prepared to appreciate that of others, which this work is intended to give him.

In the preparation of this work, I am largely under obligation to Hon. GREENE C. BRONSON, in kindly furnishing me with his original *notes* taken on the arguments of causes, as well as the entry of *additional authorities*, (which is often

made,) and the *correction* of those cited on the points. It is well known to the profession, that whatever that distinguished judge undertook to do in his judicial capacity—whether writing out an opinion, or the lesser matter of taking down notes, and entering authorities cited on an argument—was accomplished; and when it was done, it was *finished*. These notes, though generally put down in abstract sentences, are deemed to be of great value to the work; and for the simple reason, that they were *taken down* by the judge. If a portion of a counsel's argument was deemed by the judge of such special importance as to require a special entry, that entry must be considered as adding so much increased value to the points upon which it appears. Besides, these notes often contain (in few words, it may be,) valuable *general* principles of law or equity, either in the form of a question, citation, or positive assertion.

This volume commences with the first case argued and decided in the Court of Appeals, (September term, 1847;) and proceeds, in regular order, with every subsequent cause decided by the court, as it stands on the minutes, to and including April term, 1848: the causes appearing in each term respectively, being those which were *decided at that term*, without reference to the time when they were argued. But, usually, a cause was argued at the term *next preceding* that at which it was decided; some cases, however, were held over for decision two or three terms.

If this work shall be found, on examination and trial, to be *useful* and *valuable* to the profession, the time and labor (not a little) bestowed upon it, will be considered as having accomplished the object designed.

N. HOWARD, JR.

New-York, March, 1855.

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EXPLANATION

1. Judge BRONSON's *notes* are contained between these indexes, to wit :  ————— . They are printed as they were taken down ; and, wherever brackets occur in them, as follows : [—————] they include the remarks of the judge himself. The state authorities cited in these notes, are usually indicated by *J.* (*Johnson*), *C.* (*Cowen*), *W.* (*Wendell*), *H.* (*Hill*), *D.* (*Denio*), and *P.* (*Paige*.)

2. At the close of each case, if reported, it is put down as reported in *Comstock*. If not reported, it is stated "*Not reported*," which means not reported in the *Court of Appeals*. If the case is reported in the court below, it will usually be found just preceding the *points* of counsel.

3. The *folios* referring to the case, in the points of counsel, are left in their places, so that, in case it might be desirable, at any time, to refer to the original case, the *folio* would refer directly to the place desired.

CASES

IN THE

COURT OF APPEALS.

SEPTEMBER TERM, 1847.

PIERCE, plaintiff in error, *agt.* DELAMATER, defendant in error.

Questions Discussed.

1. The sufficiency of evidence to authorize a recovery under a count, for an account stated;
2. The effect of the admission or confession of a party, when resorted to as evidence against him;
3. The sufficiency of admission to authorize judgment;
4. Whether credit and effect should be given to defendant's statement "that he had a set off," where it was made at the time he admitted the correctness of plaintiff's account?

Delamater sued Pierce before a justice of the peace, and declared on an account for services rendered and an account stated—bill on file. The defendant did not appear. The plaintiff called Jonas Dinegar as a witness, who testified that he drew off the account from the plaintiff's books, and sent it to defendant; that the defendant called soon after at the plaintiff's store and said he wanted to settle; witness showed defendant plaintiff's books, and said he was authorized to settle. Defendant said the account was correct, but he had an off-set.

This was all the testimony, and the justice rendered judgment in favor of the plaintiff for \$84.12.

Pierce *agt.* Delamater.

The account as made out and shown to the defendant amounted to \$194.12½, and contained credits amounting to \$110, leaving a balance of \$84.12½. The justice's judgment was reversed by the Columbia Common Pleas, and affirmed by the Supreme Court.

R. E. Andrews, for plaintiff in error.

The judgment of the justice was against evidence, in that:

I. There is no evidence 'of an account stated, and no other count in the declaration under which the judgment could have been recovered (1 *Cow. Tr.* 3d ed. 265-6; *Kirton v. Wood*, 1 *Moody and Rob.* 253).

II. It can not be inferred from the evidence that it was Pierce's *intention* to admit that he owed the amount claimed by Delamater (*Polk's lessee v. Robertson*, 1 *Tenn. Rep.* 463; 1 *Cow. and Hill's Notes*, 210; *Law v. Merrill*, 6 *Wend.* 268).

III. The admission was too vague to authorize a judgment (*Quarle's adm'x v. Littlepage*, 2 *Hen. and Munf.* 401; 1 *Cowen and Hill's Notes*, 199, 213).

IV. *Credit* and *effect* were not given to the *discharging part* of Pierce's admission (*Cudner v. Dixen*, 10 *J. R.* 106; *Squire v. Gould*, 14 *Wend.* 159; *Kelse v. Bush*, 2 *Hill*, 440; 1 *Cow. and Hill's Notes*, 224, 227, 228, 230, 231; 2 *Steph. Nisi Prius*, 1600; *Jacobs v. Farrell*, 2 *Hawks*, 570; *Walden v. Sherburne*, 15 *John. Rep.* 413, 414, 424).

C. L. Monell and H. Hogeboom, for defendant in error.

I. The testimony of the witness Dinegar, was sufficient to authorize the judgment (*Error Book*, folio 14).

Although the whole declaration of a party must be taken, a jury may credit part and discredit another part (*Smith v. Hunt*, 1 *McCord*, 449; *Turner v. Child*, 1 *Dev.* 133; *Methodist Epis. Church, et al. v. Jaques*, 3 *J. C. R.* 115; *Kelsey v. Bush & Viele*, 2 *Hill R.* 440; *Dean v. Pitts*, 10 *J. R.* 35).

II. The admission furnished all the evidence of the correctness of the account that the law requires, and the defendant was bound to establish his offset by testimony.

JEWETT, Chief Judge, delivered an oral opinion substantially as follows: This cause originated in a Justice's Court. The judgment of the justice was reversed by the Common Pleas of Columbia county, and affirmed by the late Supreme Court.

The plaintiff declared in the Justice's Court on account for services rendered, and an account stated—bill on file. The defendant did not appear in any stage of the proceedings, a bill of items was presented by the plaintiff, containing items for work, labor, and services done and performed, and materials furnished, and goods and chattels sold. This bill formed a part of the declaration, and we think that the counsel for the plaintiff in error is mistaken in the law, that this declaration was not sufficient to sustain the judgment under the proof. We think it is; but the plaintiff in error insists that the proof is insufficient; that the whole admission of Pierce must be taken together; and that taking it together, it does not make out the case of the plaintiff below. The witness states that he copied the bill from the books of the plaintiff, and sent it to defendant. This bill amounted to some \$194, and contained credits amounting to about \$110, leaving a balance of \$84.12 due plaintiff. A few days afterwards defendant called at plaintiff's store and said he wanted to settle; witness showed defendant the books of plaintiff, and said he was authorized to settle with him; defendant said the account was correct, but he had an offset. Nothing was said by defendant as to the nature or amount of his offset; it might have been \$40, or it might have been \$1; and it was his duty to have exhibited by proof the amount of it before he could avail himself of it to reduce the plaintiff's claim. There was sufficient in the admission to establish the correctness of the plaintiff's claim, and that was all the law required. The defendant did not make out a set-off by *saying* he had one, and his omission to prove it on the trial authorized the plaintiff to recover the whole amount of his bill. We think the Supreme Court were right, and that the judgment must be affirmed.

Judgment affirmed, unanimously.

Reported in the Supreme Court, 3 Denio, 315. Reported in this court, 3 How. Pr. R. 162.

Britton & Hadley *agt.* Frink.

NOTE.—The whole confession of a party, when resorted to as evidence against him, must be taken together, although it does not follow that all is entitled to credit.

The part of a confession which it is claimed makes against the party calling it out, must be certain and full; and enough to constitute a defence if proved by other testimony.

Hence, where a defendant admitted the correctness of an account that was shown him, but at the same time said he had “an offset;” *held*, that the plaintiff’s case was made out, and defendant was bound to *prove* his set-off on the trial.

BRITTON & HADLEY, plaintiffs in error, *agt.* **FRINK**, defendant in error.

Questions Discussed.

1. Whether an action should be brought in the *name* of the *sheriff*, or his *deputy*, to recover back an excess of a bill of costs, paid by the deputy, to settle a suit against the sheriff, where the deputy declared that he paid it on his own account?

2. Whether suit was properly brought against the *partners* to recover an excess of costs, where one only appeared as attorney, and the money was received and receipt given by him?

3. Whether an excess of costs paid *without taxation* can be recovered back by action? Does an *offer* to tax, render the payment without, a *voluntary* payment?

This was a suit commenced in a Justice’s Court by Frink, sheriff, against Britton & Hadley. Plaintiff declared for moneys had and received by the defendants to the plaintiff’s use, and also for moneys overpaid on a bill of costs produced. Defendants pleaded the general issue and gave notice of set-off for goods sold and delivered, work, labor and services, and on the usual money counts.

It was admitted by defendants that they were law partners, and in business as such, also that the signature of “A. K. Hadley” to a certain bill of costs produced in court was genuine, of which the following is a copy:

 Britton & Hadley *agt.* Frink.

"SUPREME COURT.

Nathaniel Lee,
vs.
 Isaac Frink, sheriff, &c. }

Ret. fee,-----	\$2.00
Dr. Narr, 1'67, 4 copies, 6'67,.....	8.34
Serving and notice and proof,	1.63
Filing Narr, 25, Ps. 30,.....	.55
Costs, &c.,.....	.75

 \$13.27

Received payment, Oct. 13, 1845,

A. K. HADLEY, *Plffs Atty.*

The defendants also admitted a copy declaration, produced and referred to in the bill of costs, to be correct (it being the usual declaration against a sheriff for not returning an execution, and damages laid at \$200).

Plaintiff introduced one *Jeremiah Green*, as a witness, whose testimony was substantially as follows: That the plaintiff was sheriff of Saratoga county, and that Rensselaer Carrier was one of his deputies. Witness and Carrier went to defendants' to settle the suit; Carrier inquired the amount of defendants' costs, and said he would pay the amount of debt and costs when ascertained. The parties agreed upon the amount of the debt, which was between \$50 and \$60. Carrier said he wanted a bill of particulars of the costs; Hadley then made them out as above stated. Plaintiff here rested. Defendants moved for a nonsuit on the ground:

1st. That there was no evidence of the payment of money by the plaintiff, or for his use. 2d. If any money was paid, it was paid voluntarily. 3d. If it be pretended that the money was paid by mistake, it was a mistake of law and not of fact, and for which no action lies.

The motion for nonsuit was denied, and the defendants *recalled on cross-examination, Green*, who testified that Mr. Carrier said that he should pay it himself and bear the loss himself.

Defendants then called testimony and proved other items which were not charged in the bill, and for which they claimed we e

Britton & Hadley *agt.* Frink.

actually rendered before the suit was settled, to wit: *counsel perusing and signing special declaration*, also *brief*, also proof of *disbursements*, also serving *notice to plead*. Defendants produced the *draft* declaration, which was like the copy, with the exception that "John G. Britton, of counsel," was signed to it; also produced a *brief* made by defendants, which were proved by a clerk in the defendants' office; but the witness did not know whether the name of Britton was on the draft when he copied it or not; nor did he know that the brief was made before the suit was settled. He stated that in the office, they sometimes made a copy declaration to keep, and sometimes not. He did not know whether or not any proof of disbursements was ever made.

The plaintiff admitted that the defendants were attorneys and counsellors in the Supreme Court. The justice rendered judgment for plaintiff for damages \$2·00, and costs \$3·45.

The judgment was carried to the Rensselaer Common Pleas on certiorari, and reversed, on the ground "that the defendants did not receive any money of the plaintiff to his use, it was Carrier's money."

A writ of error was brought, and the judgment of reversal carried to the Supreme Court, where the judgment of the Common Pleas was reversed and that of the justice affirmed; and the following was the opinion delivered:

By the Court, JEWETT, Justice.—No issue had been joined or judgment by default entered in the suit of Lee vs. Frink before it was settled. The sum due the plaintiff was less than one hundred dollars. The defendants, as attorneys and counsellors for Lee in that suit, demanded and received for their fees and disbursements \$13·27, on its settlement. The extent of the defendants' legal charges in that suit, was \$10·85, composed of the following items:

Retaining fee as attorney,	\$3·00
Drawing declaration,	2·50
Counsel perusing, &c. (it being special),..	2·00
Four copies declaration at \$1·25,	5·00
Drawing bill of costs,	·50
	<hr/>
	\$13·00

Britton & Hadley *agt.* Frink.

Deduct one-third, -----	4.33
	<hr/>
	\$8.67
Serving narr, &c., as charged, -----	1.63
Filing narr, and postage as charged,55
	<hr/>
	\$10.85

Laws of 1840, p. 327, § 2; p. 332, § 11; sub. 2; Laws of 1844, p. 402, § 1.

The defendants overcharged \$2.42. The recovery before the justice was within that sum, and was well founded upon the evidence in the case; the judgment of the Common Pleas should be reversed and that of the justice affirmed.

A. K. Hadley and N. Hill Jr., for plaintiffs in error.

I. The action before the justice was improperly brought in the name of Isaac Frink, sheriff, &c.

1. Rensselaer Carrier was one of the deputies of Isaac Frink, sheriff, and he, Carrier, paid the bill of costs.

2. The money paid belonged to Carrier; was paid by him on his own account, for himself, and not for the sheriff Frink, and he so declared at the time he paid the money. Folios 26, 29.

3. The sheriff Frink was sued by Nathaniel Lee for not returning an execution, which had been delivered to Carrier as deputy of Frink, and he, Carrier, had been guilty of laches in not returning the said execution; and Carrier, as between him and Frink, was bound to pay all damages and costs; and this explains what Carrier said at the time the costs were paid. Folios 26 and 29.

4. Frink never authorized the payment of the money, and has never refunded to Carrier the money paid by him; and it was not, is not, nor can it be pretended, that Frink is liable to repay to Carrier.

II. John G. Britton was improperly joined in the action before the justice as defendant with Hadley.

1. In the suit commenced by Nathaniel Lee against Isaac Frink, sheriff, &c., Hadley alone appeared as plaintiff's attorney, and

Britton & Hadley *agt.* Frink.

he received the costs and gave a receipt, and signed the same—

A. K. Hadley, plaintiff's attorney. Folios 21 and 22.

2. Hadley, and not Hadley & Britton, is accountable if any one is accountable for the excess of costs; and Hadley alone ought to have been sued (4 *John. R.* 289).

3. Britton could not be sued under the statute for treble damages, or be indicted according to the evidence in this case.

III. From the evidence, no action could be maintained against Hadley, or Hadley & Britton, for the excess of costs alleged to have been received.

1. It has been decided by this court, that if the bill of costs had been taxed by a proper officer, as made out and paid by Carrier, no action would lie for the excess (2 *Denio*, 26).

2. No fees were charged and paid for expense of taxation.

3. Hadley offered and proposed to Carrier to have the costs taxed, and the taxation was waived by Carrier probably to save the fees for attendance and taxation. Folio 29.

4. The waiver of taxation by Carrier, and the payment of the costs is the same, and ought to have the same effect as if the costs had been taxed.

5. The payment of the bill of costs is therefore to be considered as a voluntary payment on the part of Carrier, with a full knowledge of his right to have the bill of costs taxed, accompanied with an offer by Hadley to have the same taxed, and the taxation waived by Carrier. The mistake, if any, was one of law not of fact (9 *Cow.* 674; 1 *Wend.* 655).

IV. If any action will lie, the action ought to have been brought in the name of Carrier.

1. The money paid was the money of Carrier, paid by him without being authorized to pay the same by Frink. Nor has Frink subsequently repaid the same to Carrier.

2. The money was paid by Carrier to save harmless and indemnify Frink from all damages and costs, in consequence of his, Carrier's, negligence in not returning the execution as deputy sheriff of Frink.

V. The plaintiff's attorney in the suit against the sheriff, received no greater amount in fact than he was lawfully entitled

to. There was no doubt a mistake in carrying out the charges for copies declaration. But in addition to the items charged he was entitled to

Counsel perusing special narr,-----	\$2.00
Notice to plead, -----	.25
Copy costs for defendant 25, service 50,-----	.75
Attending to fix amount, equivalent to attending taxation, -----	.25
	<hr/> \$3.25

E. F. Bullard, for defendant in error.

I. The action was properly brought in the name of I. Frink, sheriff, the principal.

1. Although the money was paid by Carrier the agent, it was paid directly to and for the use of Frink, the principal, and did in fact settle the suit and discharge him from liability.

2. Frink, the principal, is equally bound by the acts of his agent by a subsequent ratification. No prior request to pay was necessary (8 *Cow. R.* 60; 12 *Mass.* 60; 7 *Am. Com. Law*, 453; 9 *Peters*, 629; 4 *Wend.* 465; 10 *Wend.* 218).

3. The bringing of this suit by Frink is a ratification of the payment by Carrier the agent. Either principal or agent might sue (*Cowp.* 805; *Cow. Tr.* 80).

4. It is not proved that Carrier had the execution as deputy, as alleged by plaintiffs.

5. The principal is the only person who can disavow the acts of his agent.

6. The plaintiffs in error having acknowledged Carrier's agency by receiving the money as a payment to the use of Frink, are estopped from denying it.

II. A further answer to the plaintiff's first point is, that all this proof in regard to payment by Carrier, and loss by him, was after the motion for nonsuit (see fol. 26). After that testimony was given, the motion for nonsuit was not renewed, nor was that point raised, and the point can not now be raised on error (see *VI point* below).

III. The second point of Britton & Hadley, is easily answered, as the action is for money had and received, and was received

by one partner in the usual course of their business. Also no such point was made in the court below (see *VI point* below).

Hadley was first sued alone, and he pleaded the nonjoinder of Britton in abatement, which is the reason he did not raise that point in the court below. But this is not in the case.

IV. In answer to plaintiff's third point, the case of 2 *Denio*, 26, does not apply, as here was no taxation, and the plaintiffs took the costs at their peril.

The payment was not voluntary, as it was demanded by plaintiffs' attorney, and received, and was necessarily paid to stop suit and prevent a further increase of costs. It might as well be insisted Frink should have waited until judgment and execution, and until his property was sold thereupon, and thus pay \$30 costs by compulsion, to have a remedy to recover back \$2, illegally demanded.

The law is guilty of demanding no such absurdity. 2 *Barn. & Cres.* 729; 2 *Barn. & Ald.* 562; 1 *Chitty R.* 295; 4 *Dowl. & Ryl.* 283, all show that payment of fees illegally demanded is not a voluntary payment (9 *John. R.* 370; *id.* 201; 15 *Wend.* 321).

V. The plaintiffs received more fees than they were entitled to (see *opinion of Sup. Court, fol.* 51, and the statute there cited). The recovery before the justice is right (2 *R. S.* 650, § 56 and 57).

VI. The court can not reverse a justice's judgment on error, upon any point not made in the court below (19 *Wend.* 361; see fol. 25).

VII. The justice's judgment *presumed* correct, unless error be shown *affirmatively*. The whole evidence is not returned by the justice, and therefore the return is to be treated as a bill of exceptions, and not as a case; and plaintiffs in error confined to the points made in court below (see fol. 25; 21 *Wend.* 305; 1 *Hill*, 61; 3 *Hill*, 75; 2 *Hill*, 125; 3 *John. R.* 439).

Judgment affirmed, unanimously.

Reported in this court, 3 How. Pr. R. 102.

NOTE.—An excess of costs paid to an attorney on the settlement of a suit, without taxation, may be recovered back by *action*.

Payment of fees illegally demanded, is not a voluntary payment (2 *Barn.*

Moak *agt.* Foland.

& *Cres.* 729; 2 *Barn. & Ald.* 562; 1 *Chitty R.* 295; 4 *Dowl. & Ryl.* 283; 9 *John.* 370; *id.* 201; 15 *Wend.* 321). Thus, where an attorney brought a suit against a sheriff for not returning an execution which was in the hands of his deputy, and the deputy settled the amount of the debt, and paid the attorney his costs on the suit against the sheriff as made out, without taxation, and the sheriff subsequently brought an action and recovered judgment against the attorney for an excess of costs received; *held*, that the attorney was liable for such excess, although he offered to have the costs taxed, if the deputy requested it; they were received without taxation at his peril.

It appears from the case, that the suit was properly brought by the sheriff, although the deputy stated, when he paid the bill of costs, "that he should pay it himself, and bear the loss himself." It was a payment to and for the use of the sheriff, which discharged the suit against him, and was subsequently ratified by him in bringing the suit against the attorney. The sheriff was the only person who could disavow the acts of his deputy.

MOAK, plaintiff in error, *agt.* FOLAND, defendant in error.

Questions Discussed.

1. Whether the contract, by virtue of which certain personal property was possessed, constituted a *sale* or *bailment*?
2. The *effect* of the contract if considered a *bailment*.
3. Whether a question of *fact* was made out sufficient to establish a *conversion*.
4. The effect in this court on conflicting evidence of facts in a Justice's Court.

This suit was brought in a Justice's Court in the county of Otsego, to recover in an action of trover, the value of certain fowls Moak (the defendant below) had received of Foland (the plaintiff below) under a contract between the parties for the keeping of the fowls and the division of the eggs; and which, after the expiration of the contract, the defendant (as was alleged) converted to his own use.

The contract originally made, authorized the defendant to keep the fowls which were left by the plaintiff on a farm he had rented to the defendant, during the term of his tenancy, which was two years. He also left other personal property on the farm with the defendant, during the same term. Before the expiration of the lease, a subsequent agreement was made between the parties that the defendant should leave the plaintiff's premises at an

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earlier period than that specified in the lease. The defendant on leaving the premises carried with him the fowls; to recover their value the suit was brought.

Jacob Moak, father of the defendant, was introduced by the plaintiff (Foland) as a witness, who testified that he resided with the defendant on the plaintiff's farm from April 1844, to March 1845; left defendant on the farm when he moved away; defendant had in his possession at the time he lived there some hens of Foland's; there might have been forty of them; might not have been half of that number; witness had thirty hens of his own there; Foland's hens were there when witness went there; there was a large flock; thought there might have been forty besides witness's. *Cross-examined*: Said he was informed by the plaintiff that he, plaintiff, had hens at his son's; plaintiff told him so, soon after witness moved there; witness had seen plaintiff take away some hens from defendant's after that time; took at one time seven or eight, which were in defendant's possession. *Direct*: Plaintiff was to have all the eggs of his own hens for a certain time, but not the whole season; had heard both parties say so; thought that plaintiff was to have three eggs to defendant's five; the division of the eggs ceased about the 1st of August. *Cross*: At the time defendant told witness that plaintiff was to have eggs from his own hens, he also stated that plaintiff was to have the first run of eggs; that plaintiff was to have nothing more to do with the hens, until two years had expired that defendant had hired plaintiff's place; heard plaintiff say that he had let defendant have the hens for the period of two years that defendant had hired the place. *Direct*: When plaintiff left the farm, he left the hens there; defendant had left the farm of plaintiff; he made an agreement with him before witness moved away; did not recollect of any thing being said about defendant having the privilege of taking off the hens from the place. *Cross*: Defendant was to leave the same number of hens he had of plaintiff on the farm, when his time was out; did not know of any thing being said that defendant was to leave the same hens; defendant made an agreement with plaintiff in February to leave the farm; plaintiff was to pay defendant \$22, which was to settle all concerns up to that date, and defendant was to give up the farm on

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the 1st of April following; did not hear any thing said in relation to the hens in that settlement; witness was called by the parties as a witness to the bargain. *Direct*: The \$22 was for fall plowing, drawing stone, and other matters between them. Plaintiff stated the settlement without mentioning the items that constituted the \$22; nothing was said except that the \$22 settled up all matters between them to that date; did not recollect of any item being mentioned.

Zachariah Foland, father of plaintiff, sworn: Had a conversation with defendant at defendant's barn, shortly after the settlement between the parties, about the hens on the premises occupied by defendant; witness remarked that defendant had quite a number of hens; to which defendant replied yes, but when my father takes away his, and Hank (the plaintiff) his, I shall not have many left, because a great many have got away; defendant did not speak of the number of hens Henry had there; witness should think there were sixty or seventy hens there. *Cross-examined*: The settlement was made at witness's house; witness said, "this settles all things, up to this time," defendant said yes; plaintiff said, it is paid (\$22) for fall plowing, drawing stone, and leaving the place; there was nothing said about the hens; it was stated that every thing was settled up to that date.

James Foland, brother of plaintiff, sworn: Was present when the terms of the settlement were agreed on; defendant was to give plaintiff all he had had of him, and leave the farm on the 1st day of April; nothing was said of any particular item that he had had of him. *Cross-examined*: The agreement was made in the fore part of January; they were talking about defendant's giving up possession of the farm; knew defendant had hired plaintiff's farm for two years, and the talk was about giving up the farm for the coming year; plaintiff agreed to give defendant \$22 if he would give up possession of the farm. Fall plowing was spoken of, drawing stone, making stone wall; the fall plowing and drawing stone amounted to \$22; there was no other account that witness knew of; they talked over all their matters. Defendant let witness have two hens for plaintiff, which he took away; witness did not recollect any thing being said at the set-

tlement in relation to the hens; plaintiff and defendant had some dispute after the settlement as to whether the hens were mentioned; witness told them he could not recollect; plaintiff alleged that he reserved the hens in the settlement; the defendant denied that he had. *Direct*: Plaintiff left with defendant other personal property besides the hens; he left a fanning mill, grind stone and stove; they remained there until after the settlement in the winter. *Cross*: At the time of the conversation about the settlement between the parties, the fanning mill and grind stone were not mentioned.

Zachariah Foland, recalled: After the settlement, witness was at defendant's house, and defendant brought out a pair of andirons and gave them to plaintiff; they were a pair that plaintiff left there.

Plaintiff introduced witnesses to prove the carrying away of the hens by defendant, and their value.

John Welch, sworn for the defence: Had heard the plaintiff, in March, speak of the defendant having some hens of him; plaintiff said he had let defendant have some hens for two years; that plaintiff and defendant had made arrangements, and plaintiff had taken the place back, and had paid defendant \$22; and because plaintiff had not mentioned about the fowls when he made the arrangements, defendant was going to keep them and move them off. *Cross-examined*: The substance of what plaintiff said, was, that he had let defendant have fowls, and defendant had said he was going to take them away when he moved.

Robert Cady, sworn for defence: Heard plaintiff say that he had let defendant have some hens; it was about a year ago; plaintiff said he had let defendant have some hens—forty of them; out of the forty he was to have ten; plaintiff was to have the eggs of his hens until harvest time, and defendant was then to have them for two years; and at the end of two years he was to deliver to plaintiff thirty hens; plaintiff did not say that defendant was to return the same hens; defendant was to return thirty hens at the end of two years.

Defendant introduced witnesses to prove the value of the hens.

On the 24th of April 1845, the justice rendered judgment against the defendant for \$8.12 damages, and \$4.66 costs. The

judgment was reversed on certiorari, by the Otsego Common Pleas, and affirmed by the Supreme Court on a writ of error; the latter court reversing the judgment of reversal of the Common Pleas. The cause was then removed to the Court for the Correction of Errors by the defendant.

The following is the opinion of the Supreme Court, upon reversing the judgment of the Common Pleas, and affirming that of the justice.

By the Court, JEWETT, Justice.—The principal question on the trial was one of fact; whether the contract entered into between the parties in relation to the fowls, created the relation of bailor and bailee between the parties, or whether it was a contract of sale of the fowls to the defendant. If the former, the conduct of the defendant in regard to his trust was such as was equivalent to a conversion; but if it amounted to a sale, the action could not be sustained. The evidence was conflicting upon the question; and although I am inclined to think the weight of the evidence was against the conclusion to which the justice arrived, the judgment should not have been reversed on that ground.

C. D. Colman, for plaintiff in error.

I. The contract, by virtue of which the plaintiff in error acquired the possession of the *fowls*, was one of *sale*, and not a bailment; and the justice erred in deciding that the *identical fowls* received, were to be returned at the end of the term of two years.

1. There was no *understanding* or *agreement* between the parties to the contract, that the *identical fowls* should be returned at the end of the term (*Smith v. Clark*, 21 Wend. 83).

2. There was an *express agreement* or *understanding* between the parties, that the plaintiff in error was to return the *same number* of fowls, at the end of the term (see *Case*, fol. 28 and 45; *Hurd v. West*, 7 Cow. 752; *Smith v. Clark*, 21 Wend. 83).

II If the contract was one of *bailment*, and not a *sale*, it was a *bailment* for the term of two years; and the justice erred in giving judgment for the defendant in error (see *Case*, folios 26, 43 and 45).

1. Only one year of the term of *bailment* had expired at the time of the commencement of the suit (see *Case*, folios 16, 22 and 45).

2. No *identity* of the fowls was in any manner shown, nor was any evidence given tending to show such *identity*, by which a question of fact for the consideration of the justice was in the least established.

3. There were "a great many" of the fowls "killed or carried off by foxes," or "got away" otherwise; and no negligence of the plaintiff in error was proved, or even pretended (see *Case*, folios 31 and 35; 2 *Kent. Com.* 585-6 and 7).

III. No *conversion* of the fowls by the plaintiff in error, was in any manner shown; nor was there any evidence given tending to establish such conversion, so as to make it a question of fact, for the consideration of the justice; and the justice erred, in deciding that a *conversion* was proved.

1. The contract contained no *stipulation* or *reservation*, requiring the plaintiff in error to keep the *fowls* upon the farm occupied by him.

2. But if it contained such *restriction*, there was no evidence given tending to show that they were *removed* therefrom by the plaintiff in error, or by any person in his employ or under his direction.

3. Even were this otherwise, the *fowls* having come *lawfully* into the possession of the plaintiff in error, it was necessary to prove a *demand and refusal* to deliver; no *sale* or *destruction* of the fowls being shown (15 *Petersdorff's Abrid.* 203; *Cow. Tr.* 2d ed. 302-3).

IV. The *subsequent* arrangement made between the parties in January 1845, in no manner changed the *rights* which the parties had acquired by virtue of the contract in relation to the fowls; nor did it in any manner change the *possession*, or the rights of the plaintiff in error to the possession of the fowls for the term of two years.

1. The contract in relation to the *fowls*, was not included in that arrangement; it merely related to the possession of the farm (see *Case*, folios 29, 33, 37 and 38).

2. But if it was, no *consideration* was paid for the relinquishment of the rights acquired by the plaintiff in error to the possession of the fowls. The \$22 was paid for the "*possession of the farm*" (see *Case*, folios 28, 29 and 37).

3. But if the fowls *were* included, and a *consideration* paid, it was merely an *executory* agreement and not *executed*; the fowls being neither *delivered*, or so far separated from the others, as to be capable of *identity*, or so as to be at the risk of the defendant in error; and did not give the defendant in error such a possession of the fowls, as enabled him to maintain trover for them (*McDonald v. Hewett*, 15 *John. R.* 349; 6 *East*, 614). If it amounted to a *resale* of the fowls, to the defendant in error, the same formality of *delivery* was necessary to invest the property in him, as was necessary to pass it from him (*Quincy v. Tilton*, 5 *Greenl.* 277). An *unexecuted* agreement to *rescind* a contract will not revest the goods in the vendor, although they may be in his *possession* (*Chapman v. Searle*, 3 *Pick.* 38). And if the plaintiff in error *violated* his agreement, the remedy of the defendant in error, if any, is by an action *upon* such agreement, for a *violation* thereof, and not in trover.

V. The justice erred in refusing to nonsuit the defendant in error upon the application of the plaintiff in error, after the testimony closed.

1. The plaintiff in error having established by *affirmative* proof a defence to the right of action, *conclusive* in its character, it was his duty to nonsuit.

2. The proof of a *settlement* of all matters existing between the parties, was *affirmatively* established by the testimony of the witnesses sworn on the part of the defendant in error; and was *conclusive* upon the right of the defendant in error to a *recovery*.

VI. The suit having been commenced by *short summons*, and the declaration of the defendant in error being in *trover*, the justice was thereby deprived of jurisdiction over the person of the plaintiff in error; the plaintiff in error being liable to be imprisoned upon a judgment recovered in an action of *trover*, the suit should have been commenced by *warrant*.

VII. The justice erred in the admission of immaterial and improper testimony, under the objection of the plaintiff in error, and the whole case shows that there has been a palpable violation of law, upon undisputed facts.

A. Dean, for defendant in error.

I. The questions whether the contract or contracts under which the parties acquired their respective rights, constituted a bailment or sale of the fowls; and whether their removal by the defendant from the demised premises was a conversion, and what amount of damages the plaintiff had sustained thereby; were questions of fact, controverted on the trial, submitted to and passed upon by the justice, and his decision thereon was conclusive (*Noyes et al v. Hewitt*, 18 *Wend* 141; *Carman v. Newell*, 1 *Denio*, 25, 27).

II. The evidence in the case was sufficient to warrant the finding on the several questions in issue. For the evidence tending to establish the contract of bailment and the conversion of the fowls by their removal in violation of such contract, and the damages thereby resulting to the plaintiff, the court is referred to the following:

1. Evidence tending to establish the bailment. Jacob Moak, defendant's father, testified (fol. 22 of *Case*), that the defendant had hens of the plaintiff; that there might have been forty, and there might not have been half of that number. This witness states the proportions each party was to receive of the eggs (fol. 25 and 26). By the agreement to divide the eggs, the defendant recognized the ownership of the hens in the plaintiff. A bailment and not a sale was clearly indicated.

This witness after stating upon information derived from the defendant the terms on which the division was to be made of the eggs during a specified period, added that the defendant was to have nothing more to do with the hens "until the two years had expired that defendant had hired plaintiff's place" (fol. 26). A reasonable inference arises that at the expiration of the two years he was to have other rights, and in the absence of proof what these rights were, it may well be inferred that he was

to resume an absolute and unconditional control of the fowls, and that any interest the defendant had acquired therein would cease and be extinguished. The period during which the defendant was to retain possession of the fowls, was subsequently abridged, as will afterwards appear.

It is true this witness (the defendant's father), on his cross-examination, in reply to *leading questions* by the defendant's counsel, so modified his testimony as to state that it was not said that the defendant was to "leave the *same* hens," yet his testimony on his direct examination was competent testimony, and tended to establish the point in issue.

Zachariah Foland testified (fol. 31 and 32) that he saw sixty or seventy hens about the defendant's barn. He remarked to the defendant that he had a great number of hens. The defendant replied that he had; but when his (the defendant's) father took away his hens and "Hank" (the plaintiff) "*his*" hens, there would be but few left. The defendant's father had eighteen hens (fol. 35).

It appears from the testimony that by the terms of the original contract, the hens, which the defendant received with other personal property of the plaintiff, a fanning mill, a grind stone, a stove and a pair of andirons (fol. 39), on leasing the farm, were to be kept during the two years for which he hired the farm. The period of two years is alluded to in the testimony as the period of the bailment merely as being contemporaneous with the tenancy of the farm. The proof in effect, was that the defendant was to keep the hens while he occupied the farm. It was afterwards agreed between the parties that the defendant should leave the farm before the two years had expired, for which it was originally leased (see testimony of Jacob Moak, Zachariah Foland and James Foland). With the determination of the tenancy the bailment was determined.

An express agreement to determine the bailment was also proven. *James Foland* (fol. 35) testifies that he was to leave the farm, and "to give the plaintiff ALL *he had had of him.*" Although no time was specified for the delivery of the personal property it is reasonable to infer that it was to be delivered when the defendant surrendered the possession of the premises.

The defendant could not have employed an expression of more comprehensive import than the one employed. It certainly applies as fitly to the hens as to the other personal property, and clearly embraces both. It appears affirmatively that the defendant recognized this agreement by surrendering the andirons (fol. 39).

It is contended that the identical hens were to be returned to the plaintiff. The plaintiff insists,

First, That it clearly appearing that the defendant had the plaintiff's hens in his possession, which the plaintiff on leasing his farm to the defendant left thereon, if by any agreement under which he received the hens, he had the right to return the same number of hens, and not the identical hens, *it was incumbent on the defendant to establish, by proof*, his right to return other hens.

Second. The agreement to return the identical hens, was abundantly established by affirmative proof.

The expression of the defendant, "*all he had had of him*," is significant as well of the identity of the property as of the universality of the description.

In speaking of the hens in question in numerous conversations (see testimony *passim*), the defendant invariably refers to them as his (the plaintiff's hens), fully recognizing the title of the plaintiff to the hens spoken of. The defendant also had hens of his father.

Jacob Moak, who testifies (folio 34) that he took away seventeen of his own hens, and the remaining one of the eighteen he could not catch. In the case then of *Jacob Moak*, the defendant recognized his (*Jacob Moak's*) right to his identical hens.

2. The conversion of the fowls by their removal by the defendant from the premises, after the defendant had left the premises, is established by the testimony of *John Race* (fol. 40 and 41).

3 *Damages*. *Robert Cady*, a witness called on behalf of the defence, testified (fol. 45) that the plaintiff said he had let the defendant have forty hens; thirty of which he was to return at the end of two years, and ten at an earlier period. The plaintiff had received nine, leaving thirty-one in the defendant's hands.

It will be borne in mind that at the time of this conversation there was a subsisting agreement for the use and occupation by the defendant of the plaintiff's farm for two years, and the contemporaneous bailment of the hens, which period was subsequently abridged.

On this point, also, *Zachariah Foland* testified that he saw sixty or seventy hens about the defendant's barn (fol. 30 and 31), that the defendant said he would have *few* left after "Hank" (the plaintiff) had taken away *his* hens, and Jacob Moak had taken away his hens. The latter had eighteen hens (fol. 34). Several witnesses sufficiently attest the value of the hens.

III. The plaintiff insists that it appearing from the testimony that the plaintiff on leasing the premises to the defendant, left hens on the premises, in the absence of proof of the agreement under which they were left in the defendant's possession, the defendant would be liable in this action for carrying off the hens on removing from the premises.

IV. Objections were made by the defendant to the requirement by the justice of certain qualifications in the surety who executed the bond on an adjournment granted to the defendant. These, if well taken (and they were not), are not available here, as they were waived by the defendant proceeding to the trial of the cause.

Judgment affirmed, unanimously.

Reported in this court, 3 How. Pr. R. 84.

NOTE.—Where questions of fact arise in a cause before a justice of the peace, and evidence is given upon both sides in relation thereto, which is conflicting, it is for the justice to decide such questions, and having done so, this court will not reverse the judgment, although it may seem that the weight of evidence is against his decision.

Thus, where plaintiff let defendant have his farm for two years, and with the farm a number of fowls, and at the end of one year an agreement was entered into between the parties that defendant should give up the farm—which he did, but took away the fowls; and the plaintiff sued him in trover, and the evidence was conflicting on the trial whether the contract between the parties constituted a *sale* or *bailment* as to the fowls; *held*, that the justice having decided such question upon the evidence introduced on the trial, and given judgment thereon, it should be held conclusive.

Loomis *agt.* Monroe.

LOOMIS, plaintiff in error, *agt.* MONROE, defendant in error.

Questions Discussed.

1. Whether a written undertaking or agreement (mentioned in the case) was *original* or *collateral*?

2. Whether the agreement did not come within the statute of frauds, for want of consideration?

3. Whether plaintiff could recover under the common counts? The contract being alleged to be special and collateral.

This was an action of assumpsit, brought by Loomis against Monroe, and tried before Hon. DANIEL MOSELY, circuit judge, on the 9th April 1844.

The declaration was on the money counts—for work, labor and services, and for goods, wares and merchandise and materials found. Plea non assumpsit. On the trial, the plaintiff read in evidence, a written instrument, the due execution of which was admitted, as follows:

“I bind myself that in the event of the company not paying Mr. Loomis, under the agreement signed by him on the 17th March 1834, in relation to the construction of the Arcade, in front of his house, that I will, in my individual capacity, pay him the sum specified in the agreement, when the Arcade shall be built under the agreement. Sum to be paid by the agreement, six hundred dollars. Ballston Springs, March 17, 1834.

THOMAS PALMER.

JAMES MONROE.”

The plaintiff also read in evidence another written instrument, the due execution of which was admitted, as follows:

“I have agreed with the committee on the Saratoga Rail Road Company to sign off all claims sustained by me in the construction of the said road. This includes all lands in which I am interested, through which the road now passes. In short, I will make no claim on the directors of the rail road, after they have paid the sum of six hundred dollars for the erection of an Arcade in front of my house, known as the Sans-Souci Hotel, at which place the cars of the rail road shall be obliged to stop for the convenience of passengers going to and from Ballston Springs.

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I will superintend the construction of the Arcade; and the sum of five hundred dollars at least, shall be expended. The Arcade to be at least seventy feet long, and as wide as the one now at Saratoga Springs. I sign this as a memorandum of what I offer to do with the company, if it shall be confirmed by the company.

HARVEY LOOMIS.

Witness, THOMAS PALMER, March 17, 1834."

Thomas Palmer, a witness for plaintiff, proved the execution of the instruments; was present with Loomis and Monroe. Monroe asked Loomis, why he had not built the Arcade? Loomis said he was willing to do so, but must have some responsible person to assure him he would get the money. Monroe asked if Loomis would take him? Loomis said yes. Then they went to the Mansion House, and there the writings were executed. The Arcade was 70 feet long, and larger than the other; and witness thought as wide as the one at Saratoga Springs. *Cross-examined:* Monroe wanted to have the Arcade built, and witness supposed Mr. Loomis did also, as it was near the Sans-Souci. Witness was one of the executive committee. The Arcade was over land which had been conveyed by Loomis to the company. Loomis owned the Sans-Souci, and opened a way to the Arcade. Monroe owned no land there. The company wanted the Arcade built to keep their coaches under, though they used it but little for that purpose. Monroe was president of the company, one of the executive committee and a stockholder.

Joseph W. Loomis, a witness for, and son of the plaintiff, testified that the Arcade was built and finished in the latter part of May or June 1834; was 70 feet long and 34 feet wide. Was larger than the one at Saratoga. Saw Monroe in June 1837, in New York, after the trial at the Saratoga circuit. Presented Monroe the contract and told him it had been sent to witness to receive payment. Monroe said he was busy; witness said his directions were to prosecute. Witness told him his father had been beaten. Monroe said he had heard of the result of the suit, and said he expected to pay. He said he should see witness's father at Ballston that summer; he said there was no need of being in haste, and in the mean time he would try to get part of it out of the

Rail Road Company, and when he came to Ballston would pay his father. Witness was *cross-examined*, as to the size of the Arcade at Saratoga Springs. This was all the testimony introduced.

Defendant's counsel moved for a nonsuit, on the ground:

1st. Because it does not appear from the evidence in the cause, that there was any good and sufficient consideration for the defendant's promise.

2d. That the written undertaking of the defendant was void, for want of consideration, and for not containing any expression of a consideration.

3d. That the plaintiff, to entitle himself to recover, must show that the Rail Road Company accepted the proposition made in his writing; or had agreed with him in respect to the erection of the Arcade.

4th. That the proof in the cause was not sufficient to entitle the plaintiff to recover under the common counts.

The circuit judge nonsuited the plaintiff; to which decision the counsel for the plaintiff duly excepted.

The Supreme Court, in October term 1845, affirmed the verdict at the circuit, with the following

Opinion—BEARDSLEY, Justice.—On the 17th March '1834, the plaintiff executed a writing; by which he proposed to the Saratoga Rail Road Company, and on his part agreed to sign off and relinquish all claim for damages sustained by him in the construction of the rail road of said company through and across his land, provided the company would pay for the construction of an Arcade at Ballston, in front of a hotel owned by the plaintiff, and would stop their cars at that place for the convenience of passengers going to and from Ballston Spa. By this writing, the plaintiff offered to superintend the construction of the Arcade; and it was declared that \$500, at least, should be expended upon it. All this was strictly in the form of an offer, or proposition on the part of the plaintiff. The writing says: "I sign this as a memorandum of what I offer to do with the company, if it shall be confirmed by the company." When this proposition was signed by the plaintiff, the defendant, who was then a stockholder, and president of the company, executed a separate writing on

his part. By this the defendant engaged that when the Arcade should be built, under the agreement of the plaintiff (which has been stated), if the company should fail to make payment, according to that agreement, he, the defendant, would, individually, pay the plaintiff therefor.

It is not shown that the company ever accepted the proposition of the plaintiff, or in any form adopted or acted upon it. The plaintiff, however, went on and erected an Arcade; and this suit is brought against the defendant to recover payment for that work.

It was proved on the trial, that after the Arcade had been erected, the defendant was called upon for payment—when he stated that he expected to pay, and promised to do so.

The defendant was not legally bound by this promise, unless the Arcade had been built at his request; aside from this, his promise was without consideration. There is nothing from which a request can be implied; and the only evidence of an express request which the case discloses, is found in the written engagement of the defendant, which has been mentioned.

That can not be regarded as an original employment of the plaintiff to erect an Arcade, and an absolute engagement to pay him for doing it. It was intended to be a collateral, and not an original undertaking. In its terms the engagement is contingent. The plaintiff proposed to the Rail Road Company, that they should erect an Arcade; but this was not binding upon either party until accepted and agreed to by the company.

The substance of the defendant's engagement was, that if the company should accede to the plaintiff's proposal, and should fail to make payment for the Arcade, when erected, under such agreement, he would personally pay the plaintiff for it. But until the company accepted the offer, as made, and became bound to pay for the Arcade, the defendant was under no liability whatever to the plaintiff.

The contingency, on which the defendant was to become liable, was, that the company should first engage to pay for the Arcade; and in that event, if they failed to pay, the defendant's engagement would become absolute. As it was not shown that the

company at any time, adopted the proposition of the plaintiff, the defendant was never bound.

B. Davis Noxon, for plaintiff in error.

First. The written undertaking of the defendant may be thus stated: If Mr. Loomis will go on and build the Arcade in front of his house, in pursuance of his proposal to the committee of the Saratoga Rail Road Company, dated March 17, 1834, I will pay him therefor the sum of \$600, if the said company shall not pay him. The plaintiff *did* build the Arcade according to the proposal, and the company have *not* paid him. This was an original undertaking on the part of the defendant, and in no respect collateral. The Rail Road Company never having accepted the plaintiff's proposal, were not liable to him. The defendant's agreement was not to answer for, or pay, the debt of a third person—no such debt existed. The plaintiff built the Arcade upon the defendant's employment and promise; and is entitled to recover under the common counts set forth in his declaration (*Cow. Tr.* 3d ed. 57, 58, 59; *Miller v. Drake*, 1 *Caines' R.* 45; *Com. on Contracts*, 4th Am. ed. 15, 16, 17, 18, and cases cited there; *Allaire v. Auland*, 2 *Johns. Cases*, 52; *Austin v. McClure*, 4 *Dall.* 226; *Chitty on Contracts*, 5th Am. ed. 505, 506, 507, &c.; *Story on Contracts*, 115, 116, 117.)

Second. The case is not within the statute of frauds (*Chitty on Contracts*, 499). No writing was necessary; but if otherwise, a sufficient consideration is expressed in the writing. The credit was given to the defendant, and the work to be done by the plaintiff was consideration enough for the promise (*Chitty on Contracts*, 29; 1 *Caines' R.* 45; *Powell v. Brown*, 3 *John. Rep.* 100; *Seaman v. Seaman*, 12 *Wend.* 381; 6 *Mass. R.* 58).

Third. It was not necessary for the plaintiff to show that the Rail Road Company had accepted his proposition; this was no part of the contract. If the company had acceded to the proposal, no promise from the defendant would have been required. The court has no right to make a contract for the parties different from the one they intended to make, and different from that both understood they had made. The testimony of Palmer shows what

contract they intended to make. The contract itself shows the agreement actually made by the defendant; and the testimony of Joseph W. Loomis shows what both parties understood the contract to be.

Fourth. After the work was done, by the request, and upon the employment of the defendant, he distinctly undertook and promised to pay for it the stipulated price of \$600. The count upon an *insimul computassent* is applicable to and covers the case under this branch of the proof; and upon every principle of morality and law the plaintiff is entitled to recover (*Cowp. Rep.* 290; *Hawkins v. Saunders*, 13 *John. R.* 380; *Coventry v. Barton*, 17 *John. R.* 142).

N. Hill Jr., for defendant in error.

First. The fair import and effect of Monroe's promise is, that he was only to be bound in case Loomis's proposition or "offer" to the Rail Road Company was accepted, and they failed to pay.

The promise of Monroe, and the "offer" of Loomis, were made at the same time, and should be construed in reference to each other, as one instrument.

Both parties knew that the Arcade could not be built without an agreement with the company; as it was to be built, if at all, on the land of the company (*Case*, p. 9).

What is fairly implied by the terms of a writing is in judgment of law contained in it (10 *Wend.* 250; 5 *Hill*, 147).

Second. The only consideration expressed or implied in the promise of Monroe, is the building of the Arcade by Loomis, at a future day, for the company, under an *agreement with them*. If this is not the consideration, then the agreement, being collateral, is void by the statute of frauds.

Third It is manifest, from the whole scope of the writings executed by the parties, that the intention was to bind Monroe as *surety* for the company. And it is of the essence of all such contracts that there must be a principal debtor; and the party agreeing to become responsible for him incurs no obligation as surety, if no valid claim against the principal ever arises (*Chitty on Contracts*, 499, *Am. ed.* of 1842).

Loomis *agt.* Monroe.

Fourth. Loomis could not recover under the common counts, the promise on which he relied being collateral, viz: to pay the \$600 in case the company failed to do so.

The promise is in terms to pay *in the event* the Rail Road Company failed to do so; and every such promise is collateral (2 *Cowper*, 227, 229; 2 *Vermont R.* 453).

The plaintiff must always declare specially where he seeks to charge the defendant upon such a collateral undertaking (2 *Hill*, 589; 5 *id.* 615; 1 *id.* 82, 86).

The common counts are inappropriate where the case is such, that in order to connect the parties in privity with each other, a special contract must be proved (1 *Saund. Pl. and Ev.* 137; 7 *Johns. R.* 132, 133-4; 11 *Wend.* 664-5).

The contract in this case was highly special in its character, and Lmis woos bound to prove, 1st. That the Rail Road Company accepted his proposition; 2d. That he had performed what the terms of it required; and 3d. That the company had failed to perform on their part.

Judgment affirmed, unanimously.

NOTE.—Where L. agreed (in writing) to sign off and relinquish all claim for damages sustained by him in the construction of a rail road through and across his land, provided the Rail Road Company would pay (\$600) for the construction of an Arcade in front of a hotel owned by L., and would stop their cars at that place for the convenience of passengers—and L. offered to superintend the construction of the Arcade; and that \$500, at least, should be expended upon it—stating: “I sign this as a memorandum of what I offer to do with the company, if it shall be confirmed by the company”—and M., who was a stockholder and president of the company, executed a separate writing on his part, by which he engaged that, when the Arcade should be built, under the agreement of L., if the company should fail to make payment according to that agreement, he (M.) would, individually, pay L. therefor—*Held*, that the undertaking of M. was *collateral*, not original. In the absence of proof that the *Rail Road Company* had ever accepted or acted upon the proposition of L., although L. erected the Arcade, and then called upon M. for payment under his agreement, and M. said he expected to pay, and promised to do so; *held*, that the promise of M. was without consideration. There was nothing from which a request by M. to build the Arcade could be implied; and as the terms of his agreement was contingent and collateral, and the contingency not having happened, he was not legally bound.

SHERMAN, plaintiff in error, *agt.* WHITE, defendant in error.

Questions Discussed.

1. Did the correspondence between the parties close a contract, so that the defendant was liable upon his promissory note?
2. Was the proposition of defendant a part of the contract, which required performance on the part of the plaintiff within a reasonable time?

This was an action of assumpsit by the plaintiff (White) as the holder of the promissory note hereinafter set forth against the defendant (Sherman), as the maker thereof.

The declaration contains the common money counts, with a copy of the note annexed.

The plea is the general issue. On the trial before his honor, Daniel P. Ingraham, Esq., associate judge of the Court of Common Pleas, New York, and a jury, on the 16th day of October 1843, the plaintiff's counsel read in evidence said promissory note, the execution of which was admitted, and which is as follows:

\$175.51.

Three months after date, I promise to pay Hamilton White, or order, one hundred and seventy-five dollars and fifty-one cents, with interest, value received.

New York, Aug't 15th, 1842.

A. M. SHERMAN.

Addison M. Burt, being sworn, proved the amount, principal and interest, to October 16th, 1843, to be \$189.87. Thereupon plaintiff's counsel rested.

Defendant read in evidence, a letter from plaintiff to defendant, dated August 15, 1842, as follows:

SYRACUSE, August 15, 1842.

A. M. Sherman, Esq.

Dear Sir—Yours of the 14th is rec'd, in relation to my ctf. of sale against D. A. Sherman, in which you propose to give me your note on int., from this day, for one-half the amount, at six mos., and for the remaining half at three mos., which proposition

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I will accept, and you may forward the same to me at your earliest convenience.

Below is Statement.

Am't of bill 24th December, 1841,.....	\$335·86
Int. to 15th Aug't,	15·15
	\$351·01

Very Respectfully,

HAM'L. WHITE.

P. S. Shall I forward you, on receipt of notes, the ctf.?

The defendant then read in evidence, copies of two notes, and a copy of a letter from defendant to the plaintiff, in the words and figures following:

\$175·51.

Three months after date, I promise to pay Hamilton White, or order, one hundred and seventy-five dollars and fifty-one cents, with interest, value received.

New York, Aug't 15th, 1842.

A. M. SHERMAN.

\$175·50.

Six months after date, I promise to pay Hamilton White, or order, one hundred and seventy-five dollars and fifty cents, with interest, value received.

New York, Aug't 15th, 1842.

A. M. SHERMAN.

NEW YORK, Aug't 31, 1842.

Dear Sir—I have been detained from the city by business and sickness, ever since I addressed you from Albany, until last evening; consequently, this is the earliest opportunity of answering your letter of the 15th inst., which I find was duly received at my office. However, above I send you the two notes dated 15th Aug't, 1842, for \$175·51, and \$175·50; being the amount of your judgment against D. A. Sherman, with the interest to that date, which I believe is a compliance with my proposition for your judgment so far, and I believe, according to your understanding also. You will therefore be kind enough to assign judgment against D. A. Sherman, and the certificate of sale thereon, on the 24th day of December 1841, to me, duly acknowledging

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such assignment before a proper officer, and forward the same to me at this city, by mail. Yours, truly,

A. M. SHERMAN,

H. White, Esq.

122 Broadway, N. Y.

The counsel for the plaintiff admitted the receipt of said letter and notes, and that the note on which this suit is brought, is one of those which are mentioned in the letters read in evidence by the defendant, as above.

The defendant then called *Peter Van Antwerp*, who testified that he knew of the notes aforesaid, being put into the post office letters, directed to the plaintiff; I sealed and mailed them myself. The certificate of sale was never received by the defendant, that I know of; have been in the habit of taking from the post office letters directed to the defendant every day for a long time. Defendant went away the next day, or the second day, after the notes were sent to the plaintiff. Witness took all the defendant's letters from the post office for about three weeks afterwards; don't know of defendant's receiving any letters except what I took from the post office. Saw what I believe to be the certificate mentioned in the letters read in evidence by the defendant, in the hands of the plaintiff's attorney, since the commencement of this suit.

Addison M. Burt, called by the defendant, testified that he did not know whether the certificate of sale had been sent to the defendant by the plaintiff or not.

Question. Have you not been informed by the plaintiff that the certificate of sale had not been sent by him to the defendant till after this suit was commenced?

Answer. I have been informed by the plaintiff that he expected that defendant would call upon him on his way to the west, where the premises mentioned in the certificate of sale was situated, and that he had the certificate ready for him, and had not sent it to him.

The defendant here stated to witness, that he did not wish him to state what the plaintiff had communicated to him.

The plaintiff's counsel insisted that the witness should state all that the plaintiff had communicated to him.

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His honor, the judge, decided that the conversation having been called out by the defendant, the witness should state the whole of it. The witness then stated that after this suit was commenced, the defendant put in a plea which was demurred to, and the demurrer sustained. From that plea I inferred that defendant objected to paying this note, because he had not received the sheriff's certificate of sale--and I then wrote to the plaintiff, stating the substance of the plea, and my supposition that he defended the suit on that account. The plaintiff sent a letter endorsing the certificate to me, saying that he had upon receipt of the defendant's notes assigned the certificate and acknowledged it, and had expected that the defendant would call for it on his way to the west, where he was expected to go respecting the property mentioned in the certificate, that he had kept the certificate to give to him when he came, and directing me if the defendant declined to pay the note because the certificate had not been sent to him, to give him the certificate and stop the suit and pay the costs, if the defendant would pay the note. I thereupon, on the 23d day of February last, offered to the defendant the certificate, and to take the amount of the note and interest without costs, and the defendant refused to receive it. The witness further testified that the certificate produced was the certificate sent to him by the plaintiff. The assignment thereon endorsed, bore date the second day of September 1842. The acknowledgement bore date the sixth day of September 1842.

The assignment and acknowledgement were then read in evidence.

The plaintiff then read in evidence a letter from the defendant to the plaintiff, dated August 14, 1842, as follows:

COEYMANS, Aug. 14th, 1842.

H. White, Esq.

Dear Sir—My partner it seems rec'd your letter of the fourth ultimo in proper time, but did not send it into the country, as he expected me into the city daily, but my long absence has caused him to forward my letters, so that I have at last received it, and hasten to answer you as follows.

I will assume the payment of your judgment against my brother, costs, interest, &c., \$335.86, on the 24th Dec. 1841, by

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giving you two notes of equal am't, the first payable 3 months from the 15th inst., and the other in 6 mos., with interest from the same date; I would cheerfully name shorter periods if my other engagements afforded me any prospect of meeting them promptly, which I desire to do with the little paper which I make. I will of course include interest as a basis up to the date of my notes. If this proposition meets your views, drop me a line accordingly, and I will forward the notes immediately.

Yours, truly,

A. M. SHERMAN.

The testimony here closed.

The defendant's counsel hereupon moved the court that the plaintiff be nonsuited, and insisted that the notes in said letters mentioned, and upon one of which the present suit was brought, were given for and in consideration of an assignment of the sheriff's certificate of sale above specified, and that as that assignment had not been sent by mail, tendered or delivered, to the defendant before the commencement of said suit, there was no consideration for the note in suit.

The plaintiff's counsel insisted that he was entitled to recover under the evidence given in the cause. That the defendant's letter of August 14th, 1842, contains a distinct offer to pay, or assume the payment of plaintiff's judgment, damages, costs and expenses, by his notes; the plaintiff by letter of August 15, 1842, agrees to accept the notes of the defendant, and directs him to forward them by mail, and the minds of the parties then met. The defendant by letter of August 31st, 1842, forwards the notes in compliance with the contract, and the whole bargain was closed. There was no bargain made about the assignment of the sheriff's certificate. The plaintiff in his postscript to his letter of August 15th, 1842, after accepting the defendant's offer in the letter, asks what he shall do with the certificate. The defendant by his letter of August 31, 1842, after stating that he sent the notes in compliance with the contract, requests the plaintiff to send him an assignment of the sheriff's certificate by mail. This was a matter distinct from the bargain under which the notes were given, and concerning which the minds of the contracting

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parties never met, and formed no part of the consideration of the defendant's notes.

The Court decided as follows:

The question of fact in this case involves the point whether the defendant was to receive from the plaintiff as a part of the contract between them, the assignment of the judgment and of the certificate. The defendant's letter of the 14th August does not so state the matter, but as the plaintiff's previous letter of the 4th July is not proved, we are left to ascertain its contents from the tenor of the plaintiff's letter of the 15th August, in which he treats the defendant's proposition as relating to the certificate of sale, and in which he asks, "Shall I forward you on receipt of the notes the certificate?" From these letters it is apparent that the contract did relate to the certificate, and the defendant's reply of the 31st August, requests the same to be sent by mail. It is not essential to pursue the inquiry as to the judgment, because neither certificate nor judgment were forwarded to the defendant, and if the contract embraced the certificate alone, the question would still arise, whether the plaintiff had performed his part of the contract. As the plaintiff treats the defendant's proposition as relating to the certificate, and as the defendant required the same to be sent agreeably to the plaintiff's inquiry, it seems to me that we must assume that both parties agreed that the certificate should be sent. That it was a part of the original understanding, is presumable, from the plaintiff's letter on the subject, prior to the receipt of the notes, and the defendant's letter when he sent his notes to the plaintiff. It is true that the defendant ought to have produced the plaintiff's letter of the 4th ultimo, noticed in answer of the 14th August, but nevertheless, the plaintiff's reply of the 15th August, sufficiently evidences the fact that the defendant's proposal related to the obtaining of the certificate of sale, and that the certificate was to be the defendant's, and was to be sent to him if he so desired. The defendant did so desire simultaneously with the delivery of his notes, and if the plaintiff did not wish to do what he had himself proposed, he ought to have returned the notes to the defendant, and declined the proposition altogether. But the plaintiff insists

that the bargain was consummated by his letter of the 15th August, and that what took place afterward, although noticed in such letter, was not a part of the original contract,, and that the defendant must pay his notes, and sue the plaintiff for a breach of the new or additional agreement. This would be so, provided we came to the conclusion that the delivery of the certificate was no part of the contract. We, however, think that the plaintiff's letter of the 15th August, and the defendant's reply of the 31st did form a part of the original contract, so far at least as related to the delivery of the certificate by the plaintiff to the defendant.

It is not absolutely necessary to express an opinion upon the necessity of the assignment of the certificate or of the judgment, but it is clear that the certificate itself was to be delivered to the defendant; and we furthermore find that the plaintiff acknowledged the assignment of the certificate on the 2d September 1842, but did not forward it according to the defendant's directions, given in pursuance of the plaintiff's previous inquiry, so that we can not doubt that an assignment was intended of the certificate from the defendant's own acts; and we do not doubt that this must be esteemed a part of the contract, because the plaintiff's inquiry was a part of his letter accepting defendant's proposal, and the defendant's directions were a part of his letter delivering the notes and responding to plaintiff's inquiry. So far as the directions went beyond the plaintiff's and defendant's previous letters there may be some question, but none, we think, so far as the letters agreed up to the 31st of August. Having thus concluded that the defendant was entitled to the certificate on the delivery of the notes, and that the plaintiff promised originally to send the same, we are left to consider whether the defendant has proved a failure of consideration, by the neglect to forward him the certificate. Looking at the testimony (fol. 9) it seems that the plaintiff even after this suit was brought, admitted that he held the certificate assigned, subject to be given to defendant when he should call for it, as the plaintiff expected, but we have no proof to justify such expectation, and can not infer it in opposition to the defendant's written request to have it sent to him by mail. But the plaintiff after suit brought, authorized his attorney, if the defendant declined to pay his note,

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because the certificate had not been sent to him, to give him the certificate, and stop the suit, and pay the costs, if the defendant would pay the note. This looks as if the plaintiff, although at first willing to give up the certificate and holding it subject to the defendant's call, made it afterward conditional if the defendant would pay his note. The attorney swears that he accordingly offered to the defendant the certificate, and to take the amount of the note and interest without costs, and the defendant refused to receive it. If this means that the defendant refused to receive it, on the condition of paying the note without costs, he was legally right; or if the proposition was so made, the defendant was not bound to accede to it. It looks throughout as if the plaintiff supposed that he would hold the papers until the notes were paid; and the only evidence to the contrary is the plaintiff's declaring that he would have delivered the paper if defendant had called for it. True, the plaintiff had acknowledged the assignment, but he did not send it as both parties had agreed, nor did he send any excuse for not having so sent the same. But whatever construction this testimony may admit of, it is evident that the defendant did not receive the assignment of the certificate, nor any excuse. If this is to be likened to a contract for the purchase of land, the defendant ought to have demanded the deed. Still if it were a part of the original bargain that the certificate or deed should be sent, and it was not, can the defendant be required to pay his note. The plaintiff did not give or forward the certificate, as he had promised, and the defendant did not receive it as he expected, and desired; nor did the latter know it had been executed, and was held subject to his call; nor had he any information on the subject, even in regard to a deed for land bought. I apprehend the rules of law in cases where there is no provision on the subject would yield to the express contract of the parties; and in regard to purchases of goods or choses in action, if one purchases by letter and the things are to be sent and are not sent, the notes delivered in satisfaction could not be collected; and if one buys goods at the vendor's, and they are turned out to him, and he pays by note, I apprehend that as between the original parties to the transaction, if the vendor retained the goods contrary to his agreement, the want or failure of the consideration

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of the note might be shown; and at all events the damage arising out of the same bargain or agreement might be invoked by way of recoupment against the plaintiff's right of recovery under the proper plea (6 *Wend.* 103; 1 *Hill*, 117; 3 *id.* 171). The defendant in this case pleaded the general issue only, and he must show a total failure of consideration, otherwise he must resort to a cross action. If the defendant's letter of 31st August entitled him to an assignment of the judgment and certificate, then there could be no doubt that there was a partial failure, conceding that the executing of the assignment of the certificate and holding it, was equivalent to its delivery. But such defence would not be available under the general issue. If the contract only embraced the certificate, and the judgment was not to be assigned, then the failure of consideration may have been total, because I do not think that the execution of the assignment and holding it, was equivalent to its delivery. It is apparent then that the consideration of a promissory note is always inquirable into, between the original parties (7 *Cow.* 322; 4 *Johns.* 296; 7 *id.* 26; 17 *id.* 301); and whether the defendant in this case was entitled to an assignment of both judgment and certificate, or of the latter only, he had neither prior to the commencement of this suit. It seems necessarily to result that plaintiff can not maintain this suit, because the consideration failed and that judgment of nonsuit ought to be entered, and thereupon the court directed a nonsuit to be entered; to which decision and direction the counsel for the plaintiff then and there excepted.

ALBANY, September 29th, 1846.

Sir—I have your letter of yesterday. The case of *Hamilton White vs. Allen M. Sherman*, was decided on the argument, in May term, 1845, and the reasons of the court were assigned orally at the time. There is no written opinion.

Respectfully, yours,

A. M. BURT, Esq.

GREENE C. BRONSON.

Judgment of Common Pleas was affirmed.

B. Davis Noxon for plaintiff in error.

First. The consideration of the note in the suit appeared from a negotiation between the parties carried on by letter. The de-

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fendant's letter of the 14th of August, 1842, (*page 17 of Error Book*), contains a distinct offer to *assume* the payment of the plaintiff's judgment against his the defendant's brother, by giving his the defendant's notes for the amount payable on time, and stating unequivocally if the proposition met the plaintiff's views, that he would forward the notes immediately; and requesting the plaintiff to drop him a line, saying whether he would accept the proposition. The plaintiff's letter of August 15th, 1842, (*Error Book, p. 12*), accepts the proposition, and directs the defendant to forward the notes. The minds of the contracting parties here met, and the agreement was perfect; and on the 31st of August, 1842, the defendant did forward his notes to the plaintiff, stating in his letter the amounts, date, &c., and then saying "which I believe is a compliance with my proposition for your judgment so far, and I believe according to your understanding also." The defendant's contract was thus performed. He adds to his communication a request that plaintiff *would be kind enough* to assign the judgment, certificate of sale, &c. This was no part of the contract. (*Martin v. Frith, 6 Wend. 103*).

Second. After plaintiff's acceptance of defendant's proposition in his letter of the 15th of August, he asks in the postscript, whether he shall on receipt of notes *forward* defendant the certificate.

This was no part of the proposition, or its acceptance, and was not so considered or treated by the defendant in his letter of the 31st August.

Third. The defendant in his letter of the 31st August, asks as a favor, what neither party had before thought of, or at least said any thing about, namely, that plaintiff would "be kind enough to assign the judgment and the certificate of sale thereon, duly acknowledging such assignment," &c., and to forward the same by mail,—this clearly was no part of the contract.

Fourth. If it is not clear that the contract was made by the defendant's letter of the 14th August, and the plaintiff's answer (excluding the postscript) of the 15th August, then it was a question of fact and not of law, what the contract was, and should have been submitted to the Jury, and the court erred in nonsuiting the plaintiff.

A. Taber, for defendant in error.

The defendant in error was sued in the Common Pleas, on a note given for what he never had,—what never was offered to him until after he was sued,—what he never agreed, nor did the plaintiff understand him to agree to pay for until he had it. And no loss can happen to plaintiff if he fails, for defendant never had any thing, little or much, which ever belonged to him. Defendant may therefore well stand on his strict legal rights.

First. The sending and receipt of defendant's letter of the 14th August, 1842, and the plaintiff's reply of August 15th, did not close a contract between the parties; because,

1. Neither party in such case is bound, unless the other tenders actual performance within a reasonable time.

2. Defendant's letter related to the *payment of a judgment*, and plaintiff's to the sale of a certificate.

3. If plaintiff's proposition in his letter is to be taken as having been accepted by defendant, several of the terms of the contract were left open to future negotiation; for instance the time and manner of the assignment and delivery of the sheriff's certificate. (see *P. S.* to plaintiff's letter.)

4. Defendant's letter related to the *purchase or payment of a judgment*. Plaintiff had no judgment to sell; it was extinguished by the sale on execution.

Second. Plaintiff had no right to retain and prosecute the notes remitted in defendant's letter of August 31st, 1842, without performing within a reasonable time the express condition on which they were remitted. This he has not done.

Third. The reasoning of the Court of Common Pleas, contained in the bill of exceptions is conclusive of this cause.

Judgment affirmed, JEWETT, Ch. J. and JONES, Judge, dissented.

Not Reported.

NOTE.—The consideration of a promissory note is always inquirable into between the original parties (7 *Cow.* 322; 4 *Johns.* 296; 7 *id.* 26; 17 *id.* 301.) Under a plea of the general issue only, a total failure of consideration must be shown.

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Where a negotiation was carried on by letter between the plaintiff and defendant, by which the defendant proposed and gave to plaintiff (at plaintiff's request), his two promissory notes, to pay the debt of defendant's brother to plaintiff, and simultaneously with the sending the notes, requested that a sheriff's certificate of sale, which plaintiff held, against the brother, and which had been a subject of negotiation previously, might be assigned and sent to him; and it appeared that plaintiff had made the following inquiry of defendant in a P. S. to one of his letters "Shall I forward you on receipt of notes the ctf?" *Held*, on a suit by plaintiff against defendant on one of the notes, that the delivery of the certificate to defendant was a part of the original contract; and that having received the notes and failing to deliver the certificate before suit brought, there was a total failure of consideration for the notes.

The execution of the assignment of the certificate and holding it, was not equivalent to its delivery.

 NOVEMBER TERM, 1847.

FRENCH, JR., plaintiff in error, *agt.* CARHART, defendant in error.

Questions Discussed.

1. Whether the *reservation* in the lease referred to (in the case), was confined to the use of the stream for mills erected, &c., for *mining* purposes only.
2. Whether the reservation of "all creeks, kills, streams and runs of water" in the lease was *absolute for all purposes*.
3. Whether the conveyance and reservations bounded the party to the edge or center of the stream.
4. Whether the circuit judge erred in refusing to submit to the jury a question of fact, as to the true location of the deed under which title was derived.

Carhart sued French for *nuisance*, for overflowing his land, by reason of defendant's mill dam erected for flouring purposes on the stream below plaintiff's land, which bounded on the same stream. This stream was the Norman's kill, in Guilderland, Albany county. Defendant pleaded the general issue. The cause was tried at the Albany circuit on the 7th October, 1843, before Hon. JOHN P. CUSHMAN, circuit judge.

The plaintiff introduced in evidence, as a source of his title, two deeds which reached back to 1808, and came up to 1818,

showing the title of the premises in question in Abel French (senior).

He next introduced a deed from Abel French (senior) to Jeremiah Van Auken, dated seventeenth of February, one thousand eight hundred and twenty-nine, for the west half of said farm being the premises intended to be described in the plaintiff's declaration, together with another piece of land containing twenty-eight acres. The consideration for the whole so conveyed, being four thousand four hundred and seventy dollars; which said deed contained the following reservations and conditions as to the west half of the Traver farm, being the premises on which the nuisance is claimed to exist, to wit:

"The first described tract of land, one hundred and twenty-five acres, is conveyed, subject to an annual rent of five bushels and twenty-four pounds of good merchantable wheat, one-third part of a load of wood, a day's service with wagon and horses, one-third of four fat fowls, and to such other covenants, reservations and conditions as are mentioned in the original deed or lease forever given by General Abraham Ten Broeck, deceased." The plaintiff next introduced a deed of the same premises from Van Auken and wife to the plaintiff, dated first of April, one thousand eight hundred and thirty-seven.

Jacob Shell, a witness for plaintiff, identified the plaintiff's premises—Old Mr. French had a dam on the second fall and a mill as long ago as witness could remember; was sixty-seven years old. A dam on the upper fall (the dam in question) built above five years ago, in place of one carried off by a freshet. Did not think any previous dam threw the water as high as the present one.

Edward W. Cheesebro, a witness for plaintiff—had surveyed some—made a map of the premises in question—The whole of plaintiff's land overflowed by the dam was three and a half or four acres—about one third more than by the former dam.

Several other witnesses for plaintiff gave testimony as to the effect the present and former dams on the upper and second falls, had in flowing the water.

The defendant then introduced and read in evidence a conveyance covering the premises occupied by both defendant and

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plaintiff, from Stephen Van Rensselaer, lord of the Manor of Rensselaerwyck, to Abraham Ten Broeck and wife, dated 25th of January, 1764, conveying to the grantees a tract called Elizabethfield, containing 1322 acres of land, lying on both sides the Normanskill, reserving certain nominal rents and restrictions.

Also another deed from Stephen Van Rensselaer, the son of the said Stephen, to the same grantees, releasing the rents, reservations and restrictions in the foregoing conveyance.

Next a deed from said Ten Broeck and wife to James McKown and Abel French, dated first of February, 1805, conveying to said grantees five hundred acres of land, including the premises on which the dam is erected, lying on both sides the Normanskill, with the mills, dwelling house privileges and appurtenances. The deed contained a clause in the following terms, viz:

“Together with the privilege of erecting a dam at the fall above mentioned,” (the upper fall mentioned by the witnesses where the dam now is, not exceeding five feet in height).

The defendant then produced divers mesne conveyances, vesting the title so conveyed to M’Known and French in himself in fee.

It was admitted that the dam erected by the defendant was to supply his flouring mill, and not for any mining purposes.

The plaintiff then, in explanation of the deed of Abel French to Jeremiah Van Auken, under which plaintiff claimed title, and as a part thereof, introduced, in evidence, the lease from Ten Broeck and wife to Bullock, dated first May, 1793.

This lease contains the reservations in question, an abstract is as follows:

“This indenture, made the first day of May, Anno Domine one thousand seven hundred and ninety-three, between Abraham Ten Broeck, Esq., and Elizabeth, his wife, of the city of Albany, of the one part, and John Bullock, of the town of Bethlehem, in the county of Albany, of the other part, witnesseth: that the said parties of the first part, for and in consideration of one thousand pounds, current money of New York, to them now paid, and more especially for, and in consideration of, the rents, covenants, conditions, agreements, and provisoes hereinafter reserved,

contained, and expressed, have granted, bargained, and sold, aliened, released, and confirmed, and by these presents do grant, bargain, and sell, alien, release, and confirm unto the said John Bullock, (in his actual possession now being, by virtue of a lease therefor by indenture to him made, dated the date before the date hereof, and by force of the statute for transferring of uses into possession), and to his heirs and assigns, forever, all that certain tract of land situate, lying and being in the Manor of Rensselaerwyck, on the west side of Hudson river, about twelve miles from the city of Albany, on both sides of a certain kill or creek, distinguished by the name of Normanskill, butted, bounded and described as follows, viz: Beginning &c., (describing by metes and bounds 239 acres. Also one other piece &c., describing it contain-46 acres,) saving and always excepting to the said parties of the first part, their heirs and assigns, out of this present grant and release, all mines and minerals that are now or may be formed within premises hereby granted and released, and all the creeks, kills, runs and streams of water, and so much ground within the same premises as they the said parties of the first part, their heirs and assigns, may think requisite and appropriate, at any time hereafter, for the erection of the works and buildings whatsoever for the convenient working of the said mines, and also all such wood, firewood and timber as they may think proper to use in building, repairing, accommodating and working the said mines, with liberty to them, their heirs and assigns, and their and each of their servants, to dig through and use the ground, for either of the said purposes, and to pass and repass through the premises with their and each of their horses and cattle, carriages and servants, and to lay out roads therefor.

But it is here provided that, for the full proportion, or as many acres of land as shall be encumbered and rendered useless to the party aforesaid of the second part, his heirs, executors, administrators and assigns, by such erecting buildings and turning up the ground, ingress and egress, except necessary road, there shall be so much deducted and defalked out of the yearly rent hereby reserved as in proportion to the acres of the whole tract aforesaid, during the time that it is encumbered and rendered useless, with the right, members and appurtenances thereof, and all

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houses, edifices, profits, advantages, emoluments and hereditaments to the said tract thereby granted appertaining; also the reversion and reversions, remainder and remainders of the same, and all the estate, right and title, interest, property, claims and demands whatsoever, both in law and equity, of the said parties of the first part, of, in or to the same, or any part thereof, with reasonable estovers for building, fencing, fuel; also common of pasture for all beasts, commonable within such ground of the said manor as shall from time to time lay waste, and not particularly granted, appropriated and demised by Stephen Van Rensselaer, his heirs and assigns. To have and to hold the said tract of land premises hereby granted, with their appurtenances, with the said John Bullock, his heirs and assigns, to his and their only proper use and behoof forever, yielding and paying therefor yearly, and every year, on any day in the month of January or February, unto the said Abraham Ten Broeck and Elizabeth, his wife, their heirs and assigns, the quantity of twenty skipple of good and merchantable winter wheat, to be delivered at the dwelling house of the said Abraham Ten Broeck and Elizabeth, his wife, in the city of Albany; and also performing, with sleigh and horses, or horses and wagons, or horses and plough, and a sufficient man to drive the same, one day's service yearly and every year: also paying four fowls in lieu and stead of all other rents and services whatsoever; and upon this condition that neither the said John Bullock, nor his heirs nor assigns, do at any time hereafter erect or permit, or cause to be erected, any mill or mill dam upon any creek, kill, river or stream of water within the premises hereby granted; nor give, nor cause to be given, any manner of let or obstruction whatsoever to the said parties of the first part, their heirs or assigns, to their and each of their prejudice in the full enjoyment of the rights, titles and privileges saved to him or them by the saving and exception before in these presents above mentioned, (then giving a power of reentry &c)."

Abel French (senior) was then called as a witness by defendant. He and McKown took possession of the property in 1806. He erected a dam on the second fall in 1813, which went off the next spring in a freshet; that dam was 12 feet high. Built a second dam in 1814 in the same place, 12 feet high, which co-

vered the upper falls six inches higher than any dam he had seen on the upper falls. When the water was up he went over the upper falls with loaded scows. Second dam stood two or three years. The dam at the upper falls of 3 feet did not flow the water as high by six inches as the 12 feet dam at the second falls did. When the 12 feet dam at the second falls gave way he erected a dam at the upper falls 3 feet. When witness sold to Van Auken the latter had been all over the premises and knew of the flowing of the water. The water flowed as far on plaintiff's premises then as at this time. The mill was useless without the dam and could not be otherwise supplied. Several other witnesses were introduced by plaintiff, showing the situation of the dam at the upper falls and the flowing of the water which did not materially vary the other testimony stated on that subject.

Jeremiah Van Auken testified that he was the person who purchased the farm of French, and he sold to the plaintiff. The dam at the upper falls existed when he purchased. Carhart went over to the farm before he purchased, and saw the state of the stream, and how it was dammed up. It was dammed up all the time I owned the farm. I never made objection to it. The defendant's counsel then offered to show by this witness, in explanation of the reservations in the deed from French to him, that, at the time of the conveyance to witness by French, he was informed by French that he reserved a right to keep up the dam then standing, and to raise it to the height of five feet: defendant's counsel insisting that the language of the deed, being ambiguous, might be explained by parol proof, showing the understanding of both parties to the conveyance at the time the same was executed. But the plaintiff's counsel objected to any proof of the declarations of French, the grantor, and the circuit judge declared the same inadmissible, and excluded the same: to which decision the defendant's counsel then and there excepted.

Defendant's counsel then offered the same declarations in evidence, in explanation of the word "stream," which was contained in one of the reservations in the Ten Broeck lease, to which the plaintiff's counsel then objected, and the circuit judge excluded the same: to which decision the defendant's counsel then and there excepted.

The defendant's counsel then offered the same declarations in evidence, as proofs of the location of the deed from French to Van Auken, which bounded on the creek: but the plaintiff's counsel objected to this evidence, and the circuit judge excluded the same: to which decision the defendant's counsel also excepted.

The testimony on both sides being closed, his honor the circuit judge did deliver his opinion, and charged the jury *that the only* question of fact for them to find was the amount of plaintiff's damages; that the plaintiff had shown a perfect title to all the land covered by his deed, extending to the middle of Normanskill, subject only to the reservation of creeks, kills, streams, and runs of water, for mining purposes; that the defendant had shown no right to dam Normanskill, or use the water, except for mining purposes; that admitting that Abel French, the elder, had the absolute fee of the Van Auken farm at the time of his conveyance, and had it for a hundred years, yet, in judgment of law, his deed to Van Auken carried the grantee to the middle of the stream, and his reservation of the stream or creek was only for mining purposes.

To all and every part of which charge the defendant's counsel then and there excepted, and insisted and asked his honor to charge the jury.

1st. That the conveyance of French to Van Auken, with the reservations contained therein, bounded the said Van Auken on the edge of the stream as it then was, and gave him no title in the land then under water.

2d. That the reservation in said deed of "all creeks, kills, streams and runs of water," was an absolute reservation of the same for any and every purpose.

3d. That the location of French's deed was a question of fact for the jury.

4th. That the true construction of French's deed, and the reservation in Ten Broeck's lease, which were to be taken together as one instrument, were ambiguous, and were questions of fact for them to determine from the instruments themselves, and from the surrounding circumstances which had been given in evidence.

5th. That the defendant, having given proof of a title to the

premises occupied by him older than the plaintiff's title, and a continued occupation under it, was entitled to a verdict.

But his honor the judge refused so to charge, and stated, in substance: That the deed from French to Van Aukē reserved that right to the water only, which Ten Broeck had reserved in his conveyance; and that, having been held by the Supreme Court that this reservation was of the right to the use of the water for mining purposes only, and as it did not include the right to dam for milling purposes, any flowing of the water by the dam for milling purposes gave to the plaintiff a right of action.

To which refusal so to charge, and opinion so expressed, the defendant's counsel then and there excepted.

Under this charge, the jury found the defendant guilty of the nuisance, and assessed the damages at six cents besides costs.

The justices of the Supreme Court gave no written opinion on the decision of this cause. The cause had previously been before the Court on a motion to set aside a former verdict; and the counsel for the defendant, in opening the argument of this case, stating, in answer to an enquiry made by the court, that it involved the same question and no other, the Court said that the motion for a new trial must be denied.

On the decision of the *former* motion, the Court delivered the following Opinion:—

COWEN, Justice.—None of the cases relied on by the defendant's counsel, support the claim which he has thought proper to interpose under the clauses in question.

Jackson ex dem. Hasbrouck v. Vermilyea (6 Cowen, 677), holds that the exception of a mill site in a conveyance, operates as an exception both of the soil for the mill site and of land necessary for the pond and the milling business.

Dygert v. Mathews (11 Wend. 35), admitted an exception of so much land as is necessary for the use of a grist mill to be good, but denied its operation until the grantor or his assigns should exercise the right.

Oakley v. Stanley (5 Wend. 523), decided merely that the conveyance of land on which a factory dam stood at the time,

carried the right to flow back on other land of the grantor, and oblige those claiming under him by title subsequent to allow the same thing.

In *Prevost v. Calder* (2 Wend. 517, 519, 523, 4), it was held that excepting the *sole and only right of a stream of water, and providing that the grantee shall not erect or build any kind of water work on the stream*, but reserving the same to the grantor, operated as a general reservation of a right to use the water power.

In the case at bar, there is no exception as in those quoted, of *mill sites*, nor *so much land as is necessary for a mill*, nor the *sole right to the stream*, followed by an inhibition to erect mills, nor any thing like either.

The lease first contains the exception of *all mines and minerals*. This is immediately followed by all creeks and streams, and so much ground as the lessor, &c., may think requisite and appropriate for the erection of works and buildings for the convenient working of the mines. Wood and timber are then reserved for the same purpose; and the right to dig, with that of passing and repassing. All, however, limited to the same purpose by express terms. Farther on, there is a condition that the lessee, his heirs or assigns, are not to give any let or obstruction to the lessors, their heirs and assigns, to their prejudice in the enjoyment of all the rights, titles and privileges *saved* to him or them by the *saving and exception* before in the lease mentioned. What are those rights, titles and privileges *saved and excepted*? There is no saving or exception, *except for mining purposes*, if we are to take the words in their fair and obvious import. The *intermediate condition*, that neither the lessee nor his heirs, &c. shall erect mills or dams on the premises, is not a *saving or exception* of any right *in the lessors*, but a mere *restriction of the lessee's right*. The lessors or their friends might have claimed a monopoly of the milling business for the neighborhood, and the condition might have been inserted to secure that. It would be a most singular construction of a clause forbidding a grantee to build a mill on the granted premises, which would authorize a dam below sufficient to drown him out.

It is said to be the same thing to the plaintiff whether the dam

be built for the flouring or the mining business. How do we know that? No mine has yet been discovered. If such a discovery should ever be made, the profit may be too inconsiderable to warrant the erection of hydraulic machinery.

But the argument, if true, proves too much. The rule, if insisted on, would extend to the wood and timber, in the same clause. Thus the lessee is not only to be flowed, but his premises may be wasted for the milling business, under an exception of mines. It supposes that a man who is ready to yield an exception for a purpose by which he can probably never be affected, intends a purpose by which he certainly would. But it is said a proportionable defalcation of rent is provided for. If this were a correct principle of construction, we have no means of ascertaining the adequacy of the proportion; but it is not.

The rule laid down in *Dygart v. Mathews*, is the true one. "The reservation of the land is for a specific purpose, and an appropriation to any other object by the grantors or their assigns, is without right. They can be in no better condition than strangers." It was said in *Provost v. Calder*, that every doubt upon the words should be turned against the grantor. But I do not believe we are warranted in going to rules of construction. The expression limits the purpose. So far I have supposed that the clauses saved the right, whatever it was, to make erections off the premises demised. But clearly they did not. The exceptions are confined in the clearest terms to the streams, &c., within the boundaries of the lease to Bullock. Within that compass, Ten Broeck and those claiming under him, might have used the water for mining purposes; not on other lands, to the prejudice of the plaintiff, even for those purposes. The words of restriction on which the defendant's counsel rely as the main, if not the sole argument for the right of building a mill dam, admit of no possible application to land without the boundaries of the lease to Bullock.

The criticism which denies a full deduction of title from Bullock to the plaintiff, and insists that the defendant claims under an absolute grant prior in date to that under which the plaintiff claims, was not made at the trial. Nor if made, is it apparent how it can affect the plaintiff. Abel French, senior, is shown by

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the bill of exceptions to be the source of title common both to the plaintiff and defendant. He conveyed to Van Aukē in 1829, with clauses excepting no more than those in the lease from Ten Broeck and wife. The plaintiff stands in Van Aukē's place, from whom the title came with the same clauses as often as the transfer may have been repeated. The point stated to have been made for the defendant at the trial, implies that the title passed from Abel French, senior, and McKown to the defendant subsequently to the date of the deed to Van Aukē; and if this was not so, the fact should have been stated in the bill. The inference is against it. If the defendant in fact took an absolute title from one of the plaintiff's predecessors in his line of conveyances, and that, too, prior to the deed to Van Aukē, then I admit that the rule in *Oakley v. Stanley* applies. If the plaintiff claims under a man who might grant the right to flow, and he did so before putting his right out of his hands on the way to the plaintiff, that fact may be shown on the new trial.

The contrary must be assumed upon the case as stated in the bill.

I am of opinion that the verdict should be set aside, and a new trial granted.

John Van Buren, counsel for plaintiff in error.

First. The judge erred in charging the jury that the reservation of all "creeks, kills, streams and runs of water in French's Deed was a reservation only for mining purposes.

1. The "covenants, reservations and conditions" in the lease from Ten Broeck, are a part of the deed from Abel French, sen., to Jeremiah Van Aukē, under which plaintiff claimed title.

2. The reservation of "all creeks, kills, streams and runs of water" is absolute (*Oakley v. Stanley*, 5 *Wend.* 523; *Provost v. Calder*, 2 *Wend.* 517).

3. The construction thus given by the Court to the deed from Abel French, sen., in 1829, destroys the valuable prescriptive right the defendant has acquired by twenty-five years adverse possession.

Second. The conveyance from French to Van Aukē, with the reservation contained therein, bounded the said Van Aukē

on the edge of the stream, as it then was, and gave him no title to the land then under water (*Childs v. Starr*, 4 Hill, 369).

Third. The judge erred in refusing to submit to the jury as a question of fact, the true location of French's deed to Van Auken (*Frier v. Van Alen*, 8 J. R. 495; *Livingston v. Ten Broeck*, 16 J. R. 94; *Rockwell v. Adams*, 7 Cow. 761; *Dibble v. Rogers*, 13 Wend. 536).

Fourth. The judge erred in overruling the questions put to Abel French (fol. 46, 47); and to Jeremiah Van Auken (fol. 51, 52, 53; 9 Cow. 125; 4 Bing. N. C. 187; *Chapman v. Black*, 3 Kent's Com. 2 ed. 421, 424; 17 Mass. R. 298; *Hatch v. Dwight*, 13th Peters' Rep. 89; *Bradley v. the Washington, Alexandria and Georgetown Steam boat Co.*, R. S. 2d ed. 727, §§ 45, 47).

M. T. Reynolds, counsel for defendant in error.

First. The conveyance by French to Van Auken (under whom the plaintiff below derives title), being absolute, and without reserving any right to flow any part of the lands thus conveyed, except such right as is reserved in the lease from Ten Broeck, divested the grantor (the defendant below), of a right to flow the land conveyed.

Second. The reservation in the lease referred to, is in terms confined to the use of the stream for mills erected, &c., used for the purposes of mining.

Third. The grant containing an express reservation, thereby more strongly excludes all implied reservations.

Fourth. The court decided correctly in overruling the objections and offers made by the defendant below.

Fifth. If any error was committed in relation to such ruling, the defendant having on the hearing before the Supreme Court waived all other objections than those raised at the prior hearing, is precluded now from urging those objections. (21 Wend. 290; 6 Conn. 289.)

Judgment reversed and venire de novo ordered.

NOTE. The court *held* that the reservation of the stream, was for *all* purposes, and not for mining purposes merely. And also that the reservation

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was not merely of the natural bed of the stream, but of a right to use the stream in the same manner, and to set back the water to the same extent as when the grant was made.

Reported 1 Comstock, 96.

JEWETT, Ch. J., GARDINIER and JOHNSON, Judges, delivered opinions for reversal, in which JONES and WRIGHT, Judges, concurred. BRONSON, Judge, delivered an opinion in favor of affirming the judgment, in which RUGGLES and GRAY, Judges, concurred.

BROWN, plaintiff in error *agt.* THE MOHAWK AND HUDSON RAIL ROAD COMPANY, defendants in error.

Questions Discussed (In the Court of Errors).

1. By what general rule must a circuit judge be governed in withholding plaintiff's evidence on questions of fact, from the jury and directing a non suit.

2. Whether plaintiff's evidence was sufficient to show that the defendants rail road embankment and bridge were so negligently and unskillfully constructed and done, as to have occasioned the injury complained of by the plaintiff? (*In sweeping away by a flood the rail road bridge and plaintiff's tannery and buildings below.*) And should the evidence have been submitted to the jury?

3. Whether the evidence of the plaintiff did or did not show that the freshet or flood, which occasioned the damage complained of, was so unexpected and extraordinary in its character and extent that it could not have been reasonably anticipated or guarded against, but an act of PROVIDENCE by which the plaintiff, as well as others, suffered?

Questions Discussed (In the Court of Appeals).

1. Whether the decision of the Court of Errors in this case established the proposition that the testimony of the plaintiff below, was sufficient in point of law, to authorize the jury to find a verdict against the defendants below, and that the Supreme Court would not have been justified in setting aside the verdict found upon such testimony?

2. Whether the jury had found by their verdict, the facts, and the only facts held to be necessary by the Court of Errors, to entitle the plaintiff to a verdict?

3. Whether the deed from the plaintiff to the defendants authorized the latter to build their embankment without an opening, which plaintiff claimed should have been made to protect his buildings against floods?

4. Whether the defendants' motion for a non suit was properly overruled?

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5. Whether the *judgments* and *opinions* of a portion of plaintiff's witnesses (not experts) were properly received in evidence?

6th. Whether the evidence of what the plaintiff said to the engineer of the defendants (who had charge of building the bridge), at the time of its construction, about its sufficiency, was properly received?

7. Whether, when the *opinions* of plaintiff's witnesses were called for, and the defendants objected that the evidence was *illegal* and *improper*; not that the witnesses were not men of science or skill, that they were not experts; that the objection went to the *nature of the evidence* or to the *qualifications of the witnesses*? Should the objection have been *distinctly taken*, that the witnesses were *not experts*, to have legally excluded their *opinions* as evidence.

John Brown, the defendant in error, sued the Mohawk and Hudson Rail Road Company in 1837, in an action on the *case for negligence*, in the construction of the defendants' Rail Road *embankment* and *bridge*, along and over Mill Creek in the city of Schenectady, by means whereof a flood in March 1832, swept away the bridge, and with it, the plaintiff's buildings and tannery which stood west of the embankment and bridge. The declaration contained seven counts.

As there was a question raised, on the second trial upon a motion for a non suit that the plaintiff's declaration was insufficient to cover the particular injuries proved, and it being held, that the *third* count was broad enough to cover such injuries. It is thought best to insert that count entire, as well for that reason, as to show generally the allegations of negligence in the declaration, which are substantially the same in each count, with changes to meet the several injuries complained of.

The third count was as follows:

3d Count.—And also for that whereas, on the day and year aforesaid, and for all the time aforesaid above mentioned, to wit, at the city and in the county of Schenectady aforesaid, the said plaintiff was lawfully possessed of divers tenements and closes, and also of a certain piece or parcel of land, situated, lying and being in the city and county of Schenectady aforesaid, and on which were standing and being divers fruit trees and fences, and to which also were appurtenant divers tan vats and wells of water, dug, made and fixed on the said piece or parcel of land of the said plaintiff, and through and along which said piece or parcel of land the said defendants, during all the time aforesaid, were possessed of and entitled (under and in pursuance of the

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said act of the legislature which incorporated them), a certain rail road or way leading from the city of Schenectady aforesaid, to the city of Albany, and which said road or way, to wit, at the city and in the county of Schenectady aforesaid, passed over and across a certain creek or stream of water, running through a part of the said city of Schenectady, called Mill Creek; and during all the time aforesaid, the said defendants were of right and still are bound to make, keep and maintain their said road, way or passage over the said creek or stream of water in such a manner as that no damage or injury could arise or happen by means of the rise of water or ice, to the property or effects of any of the inhabitants of this state, through the want of care or by the negligence of the said defendants in that respect. Yet the said defendants, well knowing the premises, but intending unjustly to injure and prejudice the said plaintiff in this respect, to wit, on the said 16th day of March, 1832, and at the city and county of Schenectady aforesaid, and at divers other days and times between that day and the commencement of this suit, did wrongfully, negligently and unjustly suffer and permit the passage of their said rail road over the said creek, to be so unskilfully, insufficiently and unsafely and carelessly made, kept, maintained and continued, as that large quantities of ice and water, on the day and year last aforesaid, and at the city of Schenectady aforesaid, and at divers other days and times between that day and the commencement of this suit, by reason of such unskilfulness and want of care of the said defendants, worked and forced their way, and came against and upon the tenements, closes, and land aforesaid of the said plaintiff, by means whereof, divers, to wit, twenty-eight tenements of the said plaintiff of the value of twenty thousand dollars, then and there being in and upon the said land or real estate; together with forty tan vats of the value of one thousand dollars; one hundred fruit trees of the value of fifteen hundred dollars; one thousand rods of fence of the value of five hundred dollars, and a well of water of the value of two hundred dollars, then and there being on and affixed to the said land of the said plaintiff, were demolished, swept away, injured and lost to the said plaintiff, and he was thereby deprived of and lost his trade and business for all the time aforesaid, and all the pro-

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fits which would have arisen therefrom, for the time aforesaid, to wit, at the city and county of Schenectady aforesaid, all which is to his great damage.

All which grievances, in this declaration mentioned, are to the plaintiff's damage of twenty-five thousand dollars, and therefore he brings suit, &c.

(*Plea.*) And the said defendants by John V. L. Pruyn and Henry H. Martin, their attorneys, come and defend the wrong and injury, when &c., and say that they are not guilty of the said supposed grievances above laid to their charge, or any or either of them, or any part thereof in manner and form as the said plaintiff hath above thereof complained against them, and of this they, the said defendants, put themselves upon the country, &c.

The cause was brought to trial upon said issues at a Circuit Court held in Schenectady, before the Hon. JOHN WILLARD, circuit judge, on the 19th October 1838.

As this case involves important principles, in the construction of evidence, and the general rules of law applicable to the admissibility of and exceptions to evidence, as well as containing important testimony upon matters of fact in science skill and art, in the construction of bridges and embankments to protect against floods, &c.; it is thought proper, to do justice in preparing the case, to give the evidence *entire* on the first and second trials, together with the motions for non suit at the circuits and the decisions thereon.

This cause has been three times tried at the circuit, twice decided in the late Supreme Court, once by the present Supreme Court, once decided by the late Court of Errors and once by the Court of Appeals. (On the decision by the present Supreme Court, on appeal from the third trial, which was in favor of the plaintiff, it is understood the case was settled.)

Upon the trial, the counsel for the plaintiff to maintain and prove the issue on his part, gave in evidence as follows:

Ephraim Benedict, a witness for the plaintiff, being sworn, testified that he had resided in the city of Schenectady since 1812; was acquainted with the freshets in the Mohawk river and Mill creek; Mill creek runs from the east, westerly into the Mohawk river; has occupied a building over Mill creek, east of the rail road embankment of the defendants and west of the Erie canal, for upwards of twenty years. There was at the time of the construction of the defendants' rail road embankment (which

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was made in the fall and winter of 1831), a natural ravine, extending from the Erie canal, and near where Mill creek passes through a culvert under the canal, westerly to the Mohawk river. The east end of the ravine at the creek is four rods south of Mill creek,, and diverged from the creek as much as twenty rods, as it proceeded to the Mohawk. The upper part of the bank of the creek is two feet higher than the ravine, and it was much wider than the channel of the creek. This ravine, before the Erie canal was built, extended from the east of the canal. The defendants constructed in the fall and winter of 1831, a solid embankment, from the north bank of the Erie canal, northerly to the compact part of the city of Schenectady, across the intervening flat with the exception of Mill creek, over which they built a wooden bridge. This embankment enclosed a portion of the flats adjoining to and south of the compact part of the city. The banks of the Erie canal formed the enclosure on the south and east. The high grounds of the city on the north and the rail road embankment on the west; the Mohawk river overflows the adjacent flats as often as once a year. In the spring the ice generally dams up at the Mohawk bridge and sets the water back upon the flats, and when the ice gives way, which it usually does suddenly, a fall in the river at the bridge of from five to twelve feet is created, which produces a strong current in the neighborhood of Mill creek; before the construction of defendants' embankment, when the ice dammed up at the bridge, it raised the river above and set the water up Mill creek, and over the said flats between the canal and the river, and when the ice gave way the water rushed from the flats by a strong current; the current rises in Mill creek and along the ravine. The ravine was a natural channel in times of floods. Defendants' embankment was built across the ravine. Witness saw the flood in March 1832. Has seen the waters on the flat, west of the defendants' embankment between it and the canal, previous to 1832, higher than it was in the spring of that year, when the plaintiff's buildings were taken away; has seen it higher as often as two or three times; once in 1814; has seen it nearly as high without ice at the bridge in 1832; the water east of the defendants' rail road embankment, was about as high as the embankment; in cases of

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high water in the river, the water, notwithstanding the solid embankment of defendants, would set up Mill creek and fill the flat east of the embankment to a height equal to the water on the west, and in case of a sudden fall in the water at the bridge, the water would rush from the flat east of the embankment with a strong current, and must force its way through and along Mill creek, that being now the only outlet, as the rail road embankment was built solid over the ravine, from the creek to the canal. The plaintiff's buildings stood west of the rail road embankment, and directly west of the wooden bridge over Mill creek. This wooden bridge was taken off by the water during the said flood in 1832, and must have been borne against one of plaintiff's buildings. The plaintiff had buildings on both sides of the creek, west of the rail road embankment, which were carried off in the flood of 1832; the carrying off of the bridge naturally and inevitably swept away the plaintiff's buildings. The water in the range of the ravine wore away about two-thirds of the rail road embankment before the bridge gave way. In 1831, common prudence would have dictated the necessity of an arched stone bridge over Mill creek, and the leaving an opening in the defendants' embankment in the range of the ravine to protect the property west of the embankment. A stone bridge and an opening in the rail road embankment, would, as witness thinks, have saved plaintiff's buildings. The Erie canal was built in 1824; the banks of the canal are higher than the rail road embankment; has known the water to set up Mill creek from the river since 1832; no alteration has been made in the rail road embankment since 1832; and no particular damage has been done by high water; the high water in 1832, was caused by the damming of the ice at the Mohawk bridge, which extended up the river from one mile and a half to two miles; the extent of damming the ice was greater than witness ever before knew; the accumulation of ice was one and a half to two miles up the river; the ice was partially broken up before, and had stopt and frozen again; it lodged against the bridge and the water set back some; it remained in that situation some days and froze; there then came on a sudden thaw, and the water dammed up very high; the water set up and broke over the canal about two miles west of

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the city; the water then washed down the canal and broke over the banks into the basin made by the rail road embankment, and washed away part of the canal bank; the buildings of Brown were not carried away by the water setting back up Mill creek; the great body of the water came down the canal; some may have set back; the water was running over the canal in so large a sheet in the morning, when witness first saw it, as to carry over a canal boat; never knew the water from the river before to come down the canal and run over its banks; saw a boat in the forenoon pass over the bank of the canal; witness would have built a stone culvert over Mill creek; it might have been made wider than the bridge; the space under the canal through which Mill creek passed was as wide as the space under the bridge, but not as high; the whole space in the flood of 1832, between the canal south to the hills, was filled with water, and was as high as on the flat north of the canal; plaintiff's buildings were swept away during the night and before witness got up in the morning; in the morning, no part of the canal bank had worn away; water was lower west of the rail road embankment than east; has seen the water south of the canal before 1832, as high as it was in the flood of that year; if the water had dammed at the bridge, the sudden breaking away of the ice would have created a current strong enough to have taken away the bridge over Mill creek; a current less strong than the one in 1832, would have taken away the bridge; an opening at the ravine would have saved the bridge and plaintiff's buildings; the water ceased to run over the canal in the forenoon; there is no deep ditch running across the flat as marked for the course of the ravine in the map produced here on part of plaintiff; Mill creek was walled in as it now is, before the rail road crossed it.

John Elder, a witness for the plaintiff being sworn, testified that he had been acquainted with the Mohawk river 16 years; witness built the bridge over Mill creek for the defendants; it was a wooden bridge; it rested upon wooden posts; the posts were fastened in wooden sills, and the sills rested upon the ground; the bridge was of the same width as the present bridge; there have been for many years two stone culverts over Mill creek west of the bridge, and between it and the Mohawk river, which have

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always withstood the floods; during the building of the bridge by witness for the defendants, the plaintiff complained to the engineer who had charge of the section of the bridge for the defendants, that the bridge would be insufficient to protect his (plaintiff's) buildings; it was not, in witness's opinion, as erected, sufficient to withstand the floods witness had previously seen at that place; a stone culvert ought to have been built instead of it, and there should have been left an opening in the defendants' embankment in range of the ravine, as an outlet for the water; in the flood of 1833, the water was highest about four or five o'clock in the morning; plaintiff's buildings were carried away about one o'clock in the night; never saw the water as high before; the buildings of the plaintiff swept away, were a leather store, two curry shops, two bark houses, two wood sheds, a barn and a house, all worth about three thousand and thirty dollars; the opening at the bridge for the passage of Mill creek was larger than through the culvert at the canal.

On being cross-examined the witness says, the defendants' bridge over Mill creek was wider than the creek; it did not contract the passage way for the water; the opening of the bridge for the water was larger than the canal culvert above, over the creek; the water running out at the time of the flood ran the course of Mill creek; at the time witness built the culvert, he knew of no other water to provide for passing it, than that which ran through Mill creek and the culvert of the canal; never before knew the water to come over the canal and break through as it did at the time of this flood; witness was up all night and saw the water; his house was west of Brown's on Water street; it was on the bank of Mill creek and was injured; the water stopped rising about eight o'clock in the morning; the water east of the rail road, I think, did not begin to fall till three o'clock in the afternoon; in the afternoon before the injury, the water was rising east of the rail road, and the current of the water was down from the rail road passing my house; it continued rising that way till morning; had there been a stone culvert over the creek, the effect would have been, he thinks, to have washed the embankment through; he stated the value of the buildings as they were before removed for rail road; was not in them after

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they were refitted, and does not know what their situation was.

Further direct examination, he deposed: before the rail road bank was made, the water, after it passed the canal and overflowed Mill creek, took its course through the ravine which led quite to the Binne kill; the ravine was at the least four feet lower than the banks of Mill creek: the effect of the rail road embankment was to force every thing through Mill creek at Brown's buildings; has seen water as high in the Mohawk river as at that time. The bridge had been built in the winter; the freshet was on the 12th March 1832; sometimes the ice dammed against the Mohawk bridge, and set back as at this time; it did so about three years before; does not remember that water ever came in the canal before; previously it passed through the culverts under the canal to the south side of the canal; before the construction of the rail road embankment, the water used to spread over the whole flat; never knew any injury done to Mr. Brown's buildings before; the water took away his fences sometimes; if the bridge had held out against the flood, thinks it would have broken through above; if there had been a stone culvert of proper size, thinks it would have protected the buildings; an opening in the embankment at ravine, thinks, would have protected the buildings; most all of Mr. Brown's buildings were near Mill creek; some of them were moved to make room for the road, and built up before embankment was made.

Joseph Gillespie, a witness for the plaintiff being sworn, testified that he was present during the flood of 1832, when the bridge over Mill creek was carried off. The bridge giving away, swept off in its way, plaintiff's buildings; the nearest building was six or eight feet from the bridge; the buildings were about eight feet lower than the bridge; plaintiff's tan yard joined one bank of the creek west of embankment; it was six feet higher than the land south of it; plaintiff had tan vats in yard at the time of the flood; there were in the vats and buildings at the time, about fifteen hundred hides of leather; about one thousand were taken off by the flood; the rest were torn to pieces; a few of them were raised out of their beds and emptied of their contents; the five hundred sides that remained were injured to the amount of fifty cents a side; the thousand sides taken off were

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worth three dollars a side; eight barrels of oil were taken off, worth fourteen dollars a barrel; five do. of tallow, worth eighteen dollars a barrel; one splitting machine and currying tools, worth two hundred dollars; two thousand horns worth three dollars a hundred; one thousand tails worth two dollars a hundred; three hundred bushels of lime worth fifty-four dollars; four sets of harness worth one hundred dollars; fifty empty barrels worth twenty-five dollars; one pleasure wagon worth one hundred and fifty dollars; two lumber wagons worth eighty dollars; one set of rollers worth ten dollars; eight hundred bushels of leather scraps worth eighty dollars; also three sleighs, one sulky, one gig, ten tons of hay, forty fowls, twenty-five fruit trees, one plow, one saddle, twelve cords of bark worth four dollars a cord.

Cross-examined: Says the bridge over Mill creek went off between one and two o'clock at night; the water had not then quite reached its height; the water had all the time been running from Mill creek into the river; the string pieces of the bridge were nine feet higher than the sills of plaintiff's buildings; when the bridge was carried away, it was forced against the nearest building and started the building; this building was boarded on the east side down to the sill; the water poured over the Northern canal bank all the way from the rail road to the city; the water had run over about three hours before the buildings went away; the water broke through the south bank of canal into it, about the same time it broke through the north bank nearly opposite; the river run over the canal about one and a half miles to two miles above the city; the canal and hills on south form a large basin half a mile wide; these flats were covered.

John Kelly, a witness for plaintiff being sworn, testified that he saw the bridge over Mill creek taken off by the water; as it went off it struck the corner post of the curry shop of the plaintiff; the post gave way and the building fell, and they took the other buildings with them; thinks the water did not rise higher east of the rail road after this; it rose higher below after the bridge went away than it was before; the water broke through the banks of the canal three hundred feet west of the rail road; thinks the water on south side of canal was as high as the south bank; when the bridge went away there was a strong current in

Mill creek running down; a stone culvert over Mill creek, and an opening in the rail road embankment in range of ravine would, he thinks, have saved Brown's buildings; there was no building near the culvert under the canal.

Cross-examined · Witness is acquainted with the ground in the vicinity of Brown's property; Church street has been laid out since the freshet, across the flats to the canal, nearly parallel with the rail road; it is embanked and raised up solid like the rail road, and no opening left in it at the ravine spoken of; thinks the bridge at Mill creek at church street, a little higher than the rail road bridge; the embankment and grade of the street is higher; it is a wooden bridge, and no longer across the stream than the rail road bridge; it is wider up and down than the rail road bridge; has known the Mohawk river at Schenectady about twenty years; some years ago knew the water once by the damming of the ice in the river at the head of the island, to come into the canal, but it did not break through it; does not recollect the year; thinks the water to be guarded against in making the bridge, was the back water and the water of Mill creek; the culvert under the canal for Mill creek is a pretty good culvert; it is from eight to ten feet at the base.

Direct : In case of high water, the water sets up through the culvert above under the canal, and goes on south side; thinks there are three culverts under the canal between the city and the first lock above, about $2\frac{1}{4}$ miles; the canal banks are higher near the city than at the city; the flats descend; the water does not rise high in Mill creek, independent of the floods in the Mohawk; the creek is supplied by springs principally.

Abraham Van Ingen, a witness for the plaintiff being sworn, testified that he is a native of the city of Schenectady; he saw the flood in 1832; has seen the water east of the defendants' rail road higher than it was then; once in 1814; witness then lived in Washington street; has also seen the water higher previous to 1814; once previous to 1789, when it was as high as Wendell's gate in Mill lane, which was several feet higher than it was in 1832; since the building of the Mohawk bridge the ice frequently dams up there and throws the water back on to the flats, and when the ice gives way a strong current is produced;

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before 1832 the river dammed up to the heads of the islands; and the water ran into the canal as it did in 1832, but did not break over the banks; the ravine spoken of by the witnesses, was the natural channel in floods for the water to take in passing off; as far as I am able to judge, a stone culvert across the creek would have been necessary to protect the neighboring owners, and an opening should have been made at the ravine; floods seen by witness previous to 1832 would have taken off the wooden bridge built by defendants over the Mill creek; a wooden bridge was insufficient, in his opinion to protect the property west of it, and particularly after the construction of the rail road embankments; an opening at the ravine would have saved plaintiff's buildings; an opening in the rail road bank would, I think, have saved plaintiff's buildings; thinks prudence would have dictated the necessity of a stone bridge and an opening in the bank; in his opinion a stone bridge would have let the water off so gradually as to have saved the plaintiff's buildings.

Cross-examined : Does not know the width of the bridge; does not know of any other water to be provided for to pass through the bridge than the back water, and that passing through the culvert under the canal; never saw any other before 1832. The act incorporating the defendants, passed April 17th, 1826, was introduced in evidence, and may be referred to by either party.

A map was also introduced by the defendants, which was proved to be an accurate representation of the plaintiff's premises and the contiguous grounds, and which shows the course and operation of the flood referred to, and the places at which it broke over the banks of the canal, which map may be used by either party.

Here the plaintiff rested; whereupon the counsel for the defendants then and there, insisted before the said circuit judge that the said several matters so produced and given in evidence on the part of the plaintiff as aforesaid, were not sufficient, and ought not to be allowed or admitted to entitle the said plaintiff to a verdict. And the counsel for the defendants then and there insisted before the said judge, that the plaintiff ought to be non suited; but to this the counsel for the plaintiff did then and there

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insist before the said judge, that the said several matters so produced and given in evidence as aforesaid, were sufficient and ought to be admitted and allowed as evidence, to entitle the said plaintiff to a verdict. And the said counsel for the plaintiff then and there insisted before the said judge, that the said several matters as produced and given in evidence as aforesaid, ought to be submitted to the jury, in order that they among other things, might determine whether the defendants had been guilty of negligence and want of ordinary care and skill in the construction of their said rail road embankments and bridge, and whether the destruction of the plaintiff's buildings and property was, or was not the necessary result of such negligence and want of ordinary care and skill.

And the said circuit judge did then and there declare and deliver his opinion, that the said several matters so produced and given in evidence on the part of the plaintiff as aforesaid, were not sufficient, and ought not to be admitted and allowed to go to the jury as evidence, to entitle the plaintiff to a verdict; and the said judge did then and there non suit the plaintiff. Whereupon the counsel for the plaintiff did then and there, on behalf of the plaintiff, except to each and all of the aforesaid opinions and decisions of the said judge.

At the May term, 1840, of the Supreme Court, the bill of exceptions, which had previously been argued, was decided, and a new trial *denied*.

The following is the opinion of the Supreme Court:

NELSON, Ch. J.—The defendants having a right, by the act of incorporation, to build the embankment and bridge over Mill creek, the only question in the case is, whether the work has been so negligently and unskillfully done as to have occasioned the injury complained of. If not, and it has been brought about by an act of providence, which neither human foresight nor care could reasonably guard against, the calamity is the misfortune of the plaintiff, and it would be something more than unjust to transfer it to another.

It is insisted as a ground of negligence, that the defendants should have built a stone bridge, strong enough to have resisted

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the accumulation of the waters, or made a culvert under the embankment, so as to have divided their force. It is believed by some of the witnesses, that this precaution would have saved the bridge, and consequently the plaintiff's buildings.

There is no great difficulty in suggesting precautionary methods after the calamity has happened. The question is, whether they ought to have occurred to the party before. It is conceded, that the flood came from a quarter unknown since the erection of the canal, and in unusual and almost unprecedented quantities, as but two such had occurred before, within the memory of man.

As it was never known to overflow the canal banks the only water to be provided for, in common prudence, was that forced up the creek through the span of the bridge by the rise of the Mohawk, or coming down the stream through the canal culvert. There is no reason to doubt its sufficiency for these purposes. The opening is greater than that afforded by the culvert, and nearly equal to that of the bridge over this creek in Water street. But be this as it may, no one, I think, can read the evidence in the case, and not be satisfied that the loss of the plaintiff has happened from most extraordinary natural causes, such as rarely occur, and which human foresight is no more expected to guard against, than against the devastation of tempests, or some sudden convulsion of nature. New trial denied.

Brown, thereupon, sued out a writ of error, and brought up the judgment of the Supreme Court, to the Court for the Correction of Errors.

The cause was argued at Albany in November term, 1842.

Platt Potter, attorney. *A. Taber* and *Joshua A. Spencer*, counsel for plaintiff in error.

The points of plaintiff in error can not be obtained. They are lost or mislaid.

Pruyn & Martin, attorneys. *John V. L. Pruyn* and *Samuel Stevens*, counsel for defendants in error.

First. The embankment and bridge over Mill creek were constructed by the defendants with all requisite skill and care, and in a manner entirely sufficient to provide for all the water that could reasonably be expected at any time to pass through that channel.

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Second. The freshet in the Mohawk river in 1832, which occasioned the damage complained of, was so unexpected and extraordinary in its character and extent, that it could not have been foreseen or guarded against, but was an act of providence by which the plaintiff as well as many others suffered; and in the language of the chief justice, "it would be something more than unjust to transfer its consequences to another."

Third. The evidence being uncontradictory, and not authorizing a verdict for the plaintiff, it was the duty of the judge to grant a non suit.

On the 28th December 1842, the judgment of the Supreme Court was *reversed and venire de novo awarded*, by the Court of Errors.

The following are the opinions delivered by the Court of Errors:

THE CHANCELLOR.—The only question in this case is, whether the testimony given upon the trial of this cause, which was all on the part of the plaintiff, was sufficient in point of law to authorize the jury to find a verdict against the defendants. Although the jury is the constitutional tribunal to decide disputed facts, it does not follow that the court must submit every question of fact to their decision as a matter of course, although the party holding the affirmative has failed to introduce sufficient evidence in point of law to authorize the jury to give a verdict in his favor. Hence it is the duty of the court, if requested by the defendant to do so, to non suit the plaintiff, where the testimony is all on his side, and where it is wholly insufficient to sustain the suit. And it is insufficient in point of law to sustain the suit where it would be the duty of the court to set aside the verdict and grant a new trial, if the jury find a verdict in favor of the complainant. But where the testimony is sufficient to sustain a verdict in favor of the plaintiff, if the jury should find one in his favor, the questions of fact should be submitted to their decision; although the judge who tries the cause may think the evidence leaves the case in so much doubt that the jury would be fully justified in finding a verdict for the defendant.

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In the case under consideration, the plaintiff was bound to establish two facts, to entitle him to a verdict: *First*, that the defendants' agents had been guilty of negligence in the construction of their viaduct bridge over Mill creek. In other words, that it had not been constructed with that ordinary care and prudence which other people are in the habit of exercising in relation to their own property, and that of their neighbors similarly situated, taking into consideration the floods which might reasonably be expected from the damming up of the ice against the piers of the Mohawk bridge, and otherwise. And, *Secondly*, that the property of the plaintiff would not have been destroyed by the extraordinary and unprecedented flood which did occur, if this viaduct bridge had been so constructed, as to render the property of the plaintiff, and of the adjacent owners safe as against such freshets as might reasonably have been anticipated. That the immediate cause of a part of the injury to the plaintiff's property was the carrying off of the defendants' bridge, is pretty satisfactorily established by the evidence. Whether the same result would not probably have been produced by the damming up of the water and ice, until it overflowed and carried away the embankment, if there had been an immovable stone culvert over Mill creek, is a question to which the attention of some of the witnesses does not appear to have been particularly directed, and which may be a legitimate subject of inquiry if a new trial shall be granted.

The question, whether the evidence was sufficient to authorize the jury to say the bridge was such as to endanger the adjoining property in ordinary freshets, occasioned by the damming up of the ice in the usual manner at the Mohawk bridge, and setting the water back in Mill creek, is one which is more doubtful. And I think the Supreme Court was right in supposing that the defendants, in building their road, were not legally bound to guard against such an unusual and unlooked for occurrence, as the great flood of March 1832. For if that was the case, the state would probably be liable to make good the loss which this complainant and others sustained at that time; as the canal and its embankments unquestionably prevented the waters of the river from returning into their accustomed channel above the city,

and thereby greatly increased the volume of water which was thrown against the east side of the embankment, upon which the defendants' rail road was laid. But as I understand the testimony of Mr. Van Ingen, and some of the other witnesses, they meant to be understood that ordinary care and prudence required that there should have been an immovable stone bridge across Mill creek, and a culvert in the embankment, to protect the plaintiff's buildings from danger from the common floods occasioned by the damming up of the ice at the Mohawk bridge, which was a case of frequent occurrence, and one, therefore, which the defendants were bound to guard against. If the witnesses did not mean that, it is difficult to conjecture what they did mean, in saying that ordinary prudence would have dictated these precautions. For I do not believe any of these witnesses could have been so stupid as to suppose that ordinary prudence requires that we should guard against an extraordinary dispensation of providence, which common human foresight could not have anticipated. Viewing this testimony in the light therefore, in which these witnesses must have intended the jury should understand it, I think it was such as should have been submitted to the jury to decide upon.

For this reason, I think, the judgment should be reversed, and a venire de novo awarded.

OPINION OF THE PRESIDENT. BRADISH, Lt. Gov.—“*Sic utere tuo ut alienum non lædas*,” is a sound maxim in the law, and is particularly applicable in the present case. The defendants in error are the grantees in an important public franchise. In the enjoyment of this valuable and exclusive privilege, it was especially incumbent upon them, so to exercise their own rights as not to injure or impair the rights of others. It was their duty to exercise such forecast and precaution in the construction and use of their work, as that the property of others, using ordinary prudence, should remain safe from any danger or injury therefrom. The question in this case then, is, have the defendants, in the enjoyment of their exclusive franchise; exercised such forecast and prudence, not merely in the erection of the bridge in question, but in the construction and management of their entire

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work, so far as regards the interests involved in the present case; or whether they have been guilty of such negligence, as to have occasioned the damage complained of, and rendered themselves liable therefor to the plaintiff in the present action?

It is in proof that there had been repeatedly higher floods than that of 1832, which caused the damage alleged in this case. But the water of those floods had been safely discharged through Mill creek, and the ravine in its neighborhood. This ravine, the defendants, in the construction of their work in 1831, occupied by a high solid embankment, without culvert. In thus closing this natural estuary, through which the high floods had formerly safely discharged themselves, they forced those floods through Mill creek, as their only outlet.

This rendered it especially requisite that the defendants should have provided increased facilities and safe means for the discharge of the waters through Mill creek; such increased facilities and safe means were not provided by them. The slight wooden structure placed there, was wholly insufficient for that purpose. We have the testimony of several witnesses to this effect. One who had resided at Schenectady for thirty years, testified that "in 1831 common prudence would have dictated the necessity of an arched stone bridge over Mill creek, and the leaving an opening in the defendants' embankment, in the range of the ravine, to protect the property west of the embankment. A stone bridge and an opening in the rail road embankment, would, as witness thinks, have saved the buildings." Another witness, who had been acquainted with the Mohawk at that point for sixteen years, and who was the mechanic who built the wooden bridge in question, testified that "during the building of the bridge by the witness for the defendants, the plaintiff complained to the engineer who had charge of the section of the bridge, for the defendants, that the bridge would be insufficient to protect his (plaintiff's) buildings; it was not, in witness's opinion as erected, sufficient to withstand the floods witness had previously seen at that place; a stone culvert ought to have been built instead of it, and there should have been left an opening in defendants' embankment, in range of the ravine, as an outlet for the water." Another witness testified that "a stone culvert over Mill creek,

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and an opening in the rail road embankment in range of the ravine, would have saved Brown's buildings." Another witness who was a native of Schenectady, and must have passed a long time there, as he speaks of having seen a high flood, which happened there previous to 1789, testified that "the ravine spoken of by the witnesses, was the natural channel in floods, for the water to take in passing off;" that "a stone culvert across the creek, would have been necessary to protect the neighboring owners, and an opening should have been made at the ravine," that "floods seen by witness, previous to 1832, would have taken off the wooden bridge built by defendants over Mill creek;" that "a wooden bridge was insufficient, in his opinion, to protect the property west of it, and particularly after the construction of the rail road embankments; an opening at the ravine would have saved plaintiff's buildings; thinks prudence would have dictated the necessity of a stone bridge, and an opening in the bank; in his opinion, a stone bridge would have let the water off so gradually as to have saved the plaintiff's buildings."

Now, I think it can hardly be denied, that this testimony taken together, at least tended to prove the averments of the plaintiff's declaration, and to show that "the defendants have been guilty of negligence, and want of ordinary care and skill in the construction of their rail road embankments and bridge," and that the destruction of the plaintiff's buildings and property was the necessary result of such negligence, and want of ordinary care and skill. It is true that a portion of this testimony consists of the expression of opinion after the events had happened, which tended to show the correctness of that opinion; and that such testimony should be received with caution, and always with more than grains of allowance; that a prophecy which follows its own fulfillment, even if it prove its own verity, is not well calculated to inspire a high confidence in the inspiration that dictated it.

Yet, I think, notwithstanding this, that the testimony in this case taken altogether, was of such a character and degree, as fairly to entitle the plaintiff to the verdict of a jury upon it, and that it should have been submitted to the jury for that purpose.

The circuit judge erred, therefore, in withholding the testimony from the jury, and in ordering a non suit. This seems to me so

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clear that I do not think it necessary, in the decision of this case, to invoke the important principle of preserving the proper jurisdiction of the jury against the increasing tendency of the courts to encroachments upon and usurpation of that jurisdiction; nor to appeal to that other principle, scarcely less important, that in case of doubt, it is better to lean in favor of the jurisdiction of the jury, and thus preserve, in its utmost extent, *the trial by jury*; an institution not more essential to private rights, than it is vital to a sound, safe and practical administration of public justice.

This case seems to me free from difficulty, and its decision to be within ordinary, well settled and acknowledged principles.

In conformity with these views, I am of opinion that the judgment of the Supreme Court, affirming the decision of the circuit judge, and denying a new trial, is erroneous, and should be reversed, and a venire de novo awarded, with costs to abide the result.

OPINION OF FRANKLIN, Senator.—The courts of this state have recognized and established the doctrine, that a judge may non suit a plaintiff, when, in his judgment, if the jury had passed upon the case, and found for the plaintiff, they would have interfered and set aside the verdict as not warranted by the evidence; but in order to justify the setting aside of a verdict upon such grounds, it must be a clear and palpable case, and one in which there can be no reasonable grounds for doubt. In the case of *Woodward v. Paine and Lake*, (15 *John. R.* 493), the court denied a motion for a new trial, because from the nature of the cause, and the testimony that was given, there was room for an honest difference of opinion depending very much upon the credibility of witnesses; and they held that the question was fairly submitted to the jury. So in the case of *Foot v. Sabin* (19 *John. R.* 158), Chief Justice Spencer, in delivering the opinion of the court, laid down this rule in deciding an application to set aside a non suit: It was the duty of the judge to non suit the plaintiff, when, in his opinion, the evidence offered by him did not support his action, *and there were no questions of fact to be weighed and considered by the jury*; and if courts can rightfully non suit the plaintiff upon an *undisputed* state of

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facts, when the law is against them, they ought to do so; or where the evidence adduced *entirely fails* to make out the case of the plaintiff. Graham, in his treatise on practice, page 632, says: it is a well established rule, that courts will refuse to grant a new trial, unless the verdict is *manifestly and palpably* against the weight of evidence, even though it be directly contrary to the charge of the judge. Wherever there is room to doubt, the court will not grant a new trial, because the inclination of their opinion is at variance with the verdict of the jury. Again, in his work on new trials, he says: Facts are peculiarly the province of the jury; whether the proof offered be competent, is for the court; whether it be sufficient, when produced, is for the jury. It may be regarded as a proposition containing a rule of universal application, that where an issue of fact is fully and fairly submitted upon its merits, and the jury, in the free exercise of a sound judgment pass upon it, their verdict shall stand. Lord Ellenborough in the case of *Carstain v. Stein* (4 *Maule & Selwyn*, 192), holds a similar doctrine with the courts of our own state, in which he says, the question is, not whether the verdict given, is such a one as we ourselves would have given, but whether having been given by a jury to whom the whole case was fully left in point of fact, and to whom the law upon the subject was fully stated, it ought to be set aside, and a new trial granted. The court will not interfere, unless to remedy some *manifest abuse*, or to correct some *manifest error* in law or fact, and thereupon denied the motion. In the case of *Swain v. Hall* (3 *Wilson's R.* 45), Chief Justice Wilmot lays down this rule: That where verdicts have been given contrary to evidence, or where there hath been no evidence at all to support a verdict, the court hath granted new trials; but if there hath been a contrariety of evidence on both sides, the court have never granted new trials, notwithstanding the judge before whom the cause was tried, hath been of opinion that the strength and weight of evidence were against the verdict. Now applying these familiar and well established principles of law to the case under review: Was the evidence offered by the plaintiff below, of such a character that the Supreme Court would have felt called upon to have interfered and set aside a verdict found for the plaintiff? Would

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it have presented a case so clearly and palpably contrary to the evidence, as to have justified them in interposing the strong arm of the law, to arrest the verdict of that jury? For, if the testimony was of such a character as to have prevented them from interfering with the verdict if rendered for the plaintiff, then, in my judgment, the circuit judge committed an error in granting the non suit, but should have allowed the testimony to have gone to the jury, to be passed upon by them; for they are emphatically the judges of the facts, and it is their peculiar province to weigh and examine the evidence produced to establish the facts which they are called upon to try.

Now, what are the facts in this case, and what evidence was adduced, which the plaintiff claims he had a right to have the verdict of a jury upon? The action in the court below was brought by John Brown, the appellant, against the Mohawk Rail Road Company, for damages alleged to have been sustained by him in consequence of the manner in which that portion of the road of said company, which passes over Mill creek, had been made, kept, maintained and continued; by means of which, certain tenements and other property belonging to him, were demolished, swept away, injured and lost. And the question submitted was whether the defendants had been guilty of negligence and want of ordinary care and skill in the construction of their rail road embankment and bridge, and whether the destruction of the plaintiff's buildings and property was or was not the necessary result of such negligence and want of ordinary care and skill, as under all the circumstances of the case to render them liable to respond to him in damages for the injury which he had sustained. For the purpose of establishing those facts, it was proved by the person who built the bridge, that it was a wooden one; that it rested upon wooden posts which were fastened upon wooden sills, and that the sills rested upon the ground; that during the building of the bridge, he (the plaintiff) complained to the engineer who had charge of the section of the bridge for the defendants, that it would be insufficient to protect his buildings, and that it was not, in the opinion of the witness sufficient to withstand the floods which he had seen at that place. It was also proved that the bridge was

swept away by the freshet which soon afterwards occurred, and that the carrying off of the bridge naturally and inevitably swept away the plaintiff's buildings. That a stone bridge and an opening in the rail road embankment would have saved the said buildings. That the bridge was built in 1832, and that common prudence would have dictated, in 1831, the necessity of an arched stone bridge over Mill creek, and the leaving an opening in defendants' embankment in the range of the ravine, which was not done, to protect the property west of the embankment. That a current less strong than the one of 1832, would have taken away the bridge. That an opening at the ravine would have saved the bridge and plaintiff's buildings. That there was at the time of the construction of the rail road embankment a natural ravine extending from the Erie canal, and near where Mill creek passes, a culvert under the canal, westerly to the Mohawk river. That the waters on the flats west of the defendants' embankment, between it and the canal, previous to 1832, had been higher than it was in the spring of that year, when the plaintiff's buildings were taken away. That it had been higher two or three times. That it had been nearly as high without ice at the bridge in 1832. That the water had not quite reached its height when the bridge was carried away.

It is a well settled principle of law, that in the construction of roads and bridges, ordinary care and prudence are required in reference to all the surrounding circumstances; that the work be performed in such a manner as that no injury shall happen to the public or to individuals; and whether such care and prudence have been exercised, can only be determined by the testimony of those who are familiar with all the circumstances connected with the location and construction, and they are clearly matters of fact, upon which parties litigant have a right to the judgment of a jury, selected from the body of the county where the supposed injury happens in consequence of the want of care and prudence which the law contemplates and requires.

In reference then to the present case, whether the character of the Mohawk river—the ice dams which formed every year against the bridge erected across it—the consequent sudden elevation and depression of the water—the location of the plain-

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tiff's buildings and property, and their exposure to its concentrated rush, warranted such a construction as was there erected—whether the road, with only a single aperture through it, and that directly opposite to his buildings, was such as the nature of the case required—whether it should or should not have been made with an opening at the ravine—the bridge have been of stone or wood—or if such a structure would have saved the property injured and destroyed, and the company was required to build such an one—or in fact whether under all the circumstances of the case, and the means of information within their power, they used that degree of care and prudence which they should have done, and which the law will compel them to do, or answer for their neglect in damages to the party injured, are strictly questions of fact, depending upon evidence coming directly within the province of a jury to decide, and should have been submitted for their judgment and decision; for it is not to be presumed that the learned judge who presided at this trial, was as well qualified to pass upon the form, structure and durability of this bridge, or whether it was calculated to protect the property of the plaintiff, and the other facts and circumstances in the case, as twelve men residing in the neighborhood could be. It was a matter of opinion to be formed upon testimony, and the plaintiff possessed the right to have the judgment of those twelve men upon the testimony which had been or might be taken in the cause.

The chief justice, in delivering the opinion of the Supreme Court, says the only question in the case is, whether the work has been so negligently and unskilfully done, as to have occasioned the injury complained of. This, then, is a matter of fact; and who so well qualified to pass upon it, as a jury of the country? To my mind, it is clearly within their power and authority, and should have been submitted to them; for the right of trial by jury is a sacred and inalienable right, guaranteed to every man in the community. It is the vital principle of the common law; the law of this state, and the constitutional right of every citizen, and should be guarded with a watchful and a jealous care, lest its privileges should be abridged.

Upon these views of the case, I have been unable to arrive at any other conclusion, than that the circuit judge erred in with-

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drawing the case from the jury, and that the judgment of the Supreme Court, in refusing the application for a new trial, should be *reversed*.

Judgment reversed, and venire de novo.

For Reversal.—The Lieut. Governor, the Chancellor, Bockee, Corning, Deniston, Ely, Faulkner, Franklin, Hunt, Hunter, Johnson, Nicholas, Rhoades, Root, Ruger, Scott, Works,—17.

For Affirmance—0.

The Chancellor and Senators Franklin and Root, delivered written opinions, and Lieut. Governor delivered an oral opinion in favor of reversal.

The cause was tried the second time at the Schenectady circuit, before the Hon. PHIL0 GRIDLEY, circuit judge, on the 10th of March 1843.

The following testimony on the part of the plaintiff was introduced:

Ephraim Benedict, sworn on the part of the plaintiff, testified that he lived in the city of Schenectady since 1812, and owns property in the neighborhood of the flats, between the canal and the city, and north east of the rail road. Mill creek runs from east to west into the Mohawk river; it passes under the canal south west of the city. Witness has occupied a building standing on the bank of Mill creek above the pond, about half way between the rail road and canal, since 1812. Mill creek enters into the Binnie kill, which is an arm of the Mohawk river. Witness can not state where the swale strikes the Binnie kill; about half way between Abram Switz's and the road that goes up the river; Switz's house and shop are near together; there were no buildings in the range of this ravine in 1832; this swale was from two to three rods in width, and nearly three feet deep, he should think; in high water, before the rail road was built, the greatest portion of the water went off through this ravine or swale; buildings never sustained any injury from floods, to his knowledge, before the erection of the embankment for the Mohawk and Hudson Rail Road; in 1832, if there had been no embankment there, the flood would have passed off in the usual way. After the construction of the rail road the only outlet for the water was through Mill creek; the rail road embankment

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was solid, and extended from the canal to the high grounds of the city, with no opening except that of Mill creek; Mill creek passes under the canal through a culvert. This swale or ravine had been on the flat as long as witness can remember; its east end is but a few feet south west from Mill creek; at the rail road embankment it was several rods from the creek; witness should think nearly half way between the creek and the canal. The channel of Mill creek is walled up, and is from eight to ten feet wide; where it is not walled up it is wider; the ravine is much wider than the creek is where it is walled up. The rail road embankment on the west, canal on the south, and the high ground of the city on the north, formed a triangular basin containing an area of about five acres, the only outlet to which was at the rail road bridge, across Mill creek. The rail road embankment and bridge were constructed in the fall of 1831 and winter of 1832. The bridge was of wood; never examined it particularly, but thinks it rests on wooden posts. The Mohawk river generally flows back on the flats once a year, sometimes twice a year. The Mohawk bridge was built before witness came to Schenectady to reside (1812); when the river breaks up, ice dams are formed at the bridge, and the water sets back up Mill creek and covers the whole flat; thinks he has known the water from five to fifteen feet on the flats before rail road was built; has seen more water in the river than he saw in it in the flood of 1832; he has known the water higher on the flats than it was then; witness recollects one time in particular, it was in 1814; witness thinks he has seen the water nearly as high on the flats as it was in 1832, without any ice dam. When the flats are overflowed by an ice dam at the bridge, the water sets up Mill creek and fills the basin, and if the dam gives way suddenly, a strong current would set towards the river; has often seen such an occurrence. The plaintiff had a tan yard and several buildings on the banks of Mill creek, near to and west of the rail road embankment; some of the buildings had been removed to make the track of the rail road.

The rail road bridge was carried off in the flood of 1832; the plaintiff's buildings were also swept off; the bridge could not have been carried off without hitting plaintiff's buildings. The

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water came into this basin in the flood of 1832, by running over the canal and through the Mill creek culvert; the Mohawk river had got dammed up by the ice at the west end or head of an island in the river, a mile and an half above the city of Schenectady; witness thinks this dam extended all the way down to the bridge. This dam forced the water of the Mohawk river into and over the canal, and filled up the flats south of the canal between the canal and the hills even with the canal bank. The Erie canal was completed from 1821 to 1824; the ice has formed dams west of the islands, so as to throw the water on to the flats, before the canal was made, but since the canal was built has not known the water to be thrown over the canal on to the flats on the south side of it, by dams or otherwise; nor does he know the water of the river ever being thrown into the canal by means of those ice dams, until the spring of 1832; the water has passed through the culverts under the canal on to the flats, on the south side of the canal, in consequence of the formation of these ice dams.

The counsel for the plaintiff put the following question to the witness:

Question. *How could the rail road embankment have been constructed so that, in your judgment, it would have protected the plaintiff's buildings?*

This question was objected to by the defendant's counsel upon the ground that it was irrelevant and impertinent to the issue to be tried, and also upon the ground that the inquiry was as to the opinion or judgment of the witness, which was not legal evidence to go to the jury.

But his honor, the circuit judge, decided that the inquiry was legal, pertinent and proper; and overruled the said objection thereto, and directed the question to be answered.

To which decision and opinion the counsel for the defendants excepted, and the witness answered:

"By building a stone culvert over Mill creek, and another at the ravine, under the rail road bank, for the water to pass off by."

On being cross-examined the witness further testified that the ravine spoken of by him, run through the lands of plaintiff and

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of the Campbell estate. It was pastured; don't recollect whether there were any apple trees set in it or not.

The water run over the canal at the freshet in 1832, between Mill creek and the city, near How's store, made a hole in the bank there; it also run over the canal quite a distance; was not confined to one place; at a place close by and north of the rail road. Plaintiff's buildings were carried off in the night. Witness left his buildings on Mill creek the day before the flood, near night, and did not return till the next morning, and then plaintiff's buildings were gone and the water was pouring over the canal. The ice had not given way at the Mohawk bridge or in the river the next morning. The water continued rushing over the canal till near noon; if the ice dam had given way in the river, the water would have run off down the channel of the river. The water also broke over the canal west of the rail road near Rotterdam street, and run across the flats into the river from that point. When the water stopped running over the canal into the basin, it remained high in the basin and on the flats all that day and the day following; the water was so high in the river that it could not drain off the flats.

There was a strong current setting down Mill creek after the water ceased to run over the banks of the canal. About nine o'clock in the morning witness went down to plaintiff's buildings; saw they were gone, and that the top of the bridge was gone also; had not been down there within the last twenty-four hours previous to that time; that is all he knows how either the buildings or bridge went off.

Church street crosses Mill creek just above the rail road bridge; has seen the Church street bridge repeatedly; it is a wooden bridge; it was built five or six years ago, or more perhaps; it is about the same size of the rail road bridge; the rail road bridge was immediately rebuilt of wood; both bridges have stood ever since; they stood through the floods of 1839, '40 and '41, when the water was as high as it was in 1832, but it did not run over the canal so much as it did then. In 1832 there was a thaw in January; the ice broke up and dammed; then froze again, and afterwards the ice broke up a second time in March and dammed at the head of the islands, and threw the water into and over the

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canal, and filled up the flats south of the canal; large masses of ice and timber were thrown from the canal into the basin. Witness is a hatter and wool dealer. Last spring the water rose ten feet above the level of the flats at the old city mills, which witness now owns.

On being reexamined by plaintiff's counsel the witness further testified that previous to the flood of 1839 there were substantial stone walls built upon each side of Mill creek, laid in mortar or cement, just above and joining Church street bridge, and an engine house built over and on these walls; these walls were higher than the bridge, and were 18 inches thick, as I think.

On being again cross-examined, he testified that Church street continued is a solid embankment, like the rail road, and running to the canal very nearly parallel with the rail road, and but a short distance up Mill creek from it without any opening in the embankment, except the bridge at Mill creek.

John Elder, sworn on the part of the plaintiff, testified that he was in 1832 a carpenter and joiner, and was employed by the defendants to build the bridge in question, over Mill creek. It was built in the winter of 1832. It was built of hemlock timber. It was constructed with four mud sills; two on each side of the stream; the inside sills on those nearest to each side of the creek, were twenty-four or five feet apart, so as to leave the opening or stretch of the bridge across the creek 24 or 25 feet wide. The two outside sills were laid parallel with the inside sills, twelve feet back from them; wooden posts were framed into these sills, and plates framed on to the top of the posts, and the string pieces placed on the top of the plates, and the flooring laid on those string pieces; there were no fastenings of the sills to the ground. The channel of the creek under the bridge was from eight to ten feet wide, and was walled up on each side. The plaintiff's buildings were west of the rail road, and on both sides of Mill creek; one building stood close up against the embankment, so that it only left a space of six or seven feet between the top of the bridge and the buildings. The bridge was eighteen feet wide. There were two stone culverts over Mill creek west of the bridge, prior to 1832; witness believes they are there yet. Witness has been acquainted with that part of the city over

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twenty years. [Witness heard the plaintiff say to Mr. Crane (one of the defendants' engineers), while the bridge was building, that "defendants had agreed to build a stone bridge or culvert, and he did not want a wooden bridge; that he did not think that bridge was sufficient; they had agreed to build a stone bridge, and he wanted them to do it." That was all that was said; nothing was said about exposure of plaintiff's buildings to the water.]

The questions which elicited the testimony included in brackets, and the said testimony, was objected to by defendants' counsel as illegal and inadmissible.

But his honor, the circuit judge, overruled the objection, and admitted the evidence.

To which decision and opinion the counsel for the defendants excepted.

The plaintiff's counsel then inquired of the witness *whether, in his opinion, the bridge was sufficient to stand the ordinary freshets, which witness had seen at that place previous to 1832?* This inquiry was objected to as inadmissible and illegal, that the opinion of the witness could not be evidence in the case. But the objection was overruled by his honor, the circuit judge, and the inquiry and the question permitted to be put to the witness.

To which decision the defendants' counsel excepted.

The witness in answer to said inquiry, testified that he did not think the bridge was sufficient to withstand the floods he had seen prior to 1832. Witness thinks there should have been a stone arch bridge over Mill creek, and a culvert in the embankment at the ravine.

Plaintiff's counsel then asked the witness *how, in his opinion, the embankment for the road and the bridge could have been constructed so as to have protected the plaintiff's buildings?*

This inquiry was objected to by the defendants' counsel as illegal and improper, but the objection was overruled by his honor, the circuit judge, and defendants' counsel excepted, and the witness in answer to said question, testified that he thought a culvert in the embankment at the ravine, and a stone bridge over Mill creek would have protected the plaintiff's buildings from the flood in 1832. Witness thinks a stone bridge alone over

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Mill creek would have protected plaintiff's buildings against that flood, because he thinks the bank at the ravine would have worked away as it nearly did. The flood wore away considerable of the embankment near the ravine. There were no buildings in the range of the ravine west of the rail road. Thinks the water did not come up to the plank of the bridge. Witness was not present when the bridge went away; thinks it went off between ten and twelve at night. Witness was there about midnight and the bridge was gone. Has been acquainted with the floods of the Mohawk; has known ice dams to form at the head of the islands previous to 1832, and the water being forced through two culverts under the canal about two miles west of the city, and then came down on the south side of the canal, and run through the culvert at Mill creek with such force as to spout up on the north side of the canal. Before the rail road was built the water would run down Mill creek, unless there was so much as to overflow its banks, and then a portion of the water that flowed over the banks of the creek would run down the ravine. Witness don't know that plaintiff's buildings were ever injured by water before; but about three years before 1832 the spring freshet broke in the walls of witness's buildings, which stood below plaintiff's, and injured the buildings. The fences on the flats were sometimes carried off with these freshets. Ice dams sometimes form at the Mohawk bridge; know of its doing so several times; frequently before 1832. In such case the water of the Mohawk is set back so as to run through the upper culverts under the canal, and come down on the south side of the canal. A dam at the Mohawk bridge would also set the water back up Mill creek. Has known the water in such case to rise seven or eight feet and go down again in two or three hours. This was four years before 1832. Has seen the water move up Mill creek with a rapid current. The ravine extended all the way to the river. Witness thinks it was four feet lower than the plaintiff's buildings, and two or three feet lower than the adjacent ground. Plaintiff's buildings were elevated above the ground eight feet or more. Recollects no instance but the one he has mentioned of the water rising rapidly; at that time witness had crossed at Rotterdam street, and could not get back, and

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had to go to the city on the bank of the canal; witness thinks the water run in the canal; at this time it was not full; the water was on the flats on the south side of the canal at that time, but not near so high as in 1832.

The witness was then further interrogated as to the value of the plaintiff's buildings, which were carried off by the flood of 1832; but no portion of the testimony in relation to the value of the property destroyed or injured is set out, as no question arises in relation to the amount of damages.

On being cross-examined, the witness further testified that he does not know the size or dimensions of the Mill creek culvert under the canal; the opening of the rail road bridge for the passage of Mill creek, was twenty-four feet wide, and the posts were eight or nine feet high. Mill creek was walled up on each side; it was eight or ten feet wide, and the bottom of the creek was eight or ten feet below the surface of the ground where the mud sills of the bridge were placed. The creek passed through the centre of the opening or stretch of the bridge; the opening of the bridge extended an equal distance each side of the creek. Witness don't recollect the size of the mud sills; thinks they may be eight by twelve inches; there were two mud sills each side of the creek twelve feet apart; six posts were framed into each sill and four plates framed on the tops of the posts, each plate being supported by six posts; braces run from near the foot or bottom of the posts into the floor timbers or string pieces above; thinks there were no braces from the sills into the posts. There was an embankment from Water street to Mill creek for the road; the rail road was on a level with Water street; the slope at the end of the embankment, each side of Mill creek, formed an angle of about 45 degrees; the embankment covered the outside sills of the bridge, and came on to the sills that lay next to the creek, and came clear up to the top of the outside plates. The opening or water way of the bridge at Mill creek was sufficient to pass off all the water that could pass through the Mill creek culvert under the canal; the opening at the bridge was larger than the culvert; the opening of the bridge was large enough to let all the water pass back that would set up through it. Witness thinks Mr. John I. DeGroff employed him to build the bridge on

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behalf of the company; when witness built the bridge, he did not know of any thing to be guarded against except the water that might set back from the river up Mill creek, and the water that might come through the Mill creek culvert under the canal. Witness was at the bridge the night it went, about 9 o'clock; the water was then above the stone banks of the creek at the bridge, and was running down towards the river; the water was not then running over the canal, it came through the Mill creek culvert under the canal. Witness was back again to the bridge between 12 and 1 o'clock; bridge was then gone. Witness helped rebuild this bridge; it has stood ever since it was rebuilt; the mud sills were not carried away with the flood; they remained where they had been placed when the bridge was built. The flood did not take off any fences on the flats, at the time it rose seven or eight feet on the flats and fell again in a few hours, mentioned in witness's direct examination; at the time of the flood of 1832, the water could not have set back up Mill creek. Before the rail road was built there were small buildings standing over Mill creek, such as privies; never knew any of them carried off by any flood that occurred before 1832. The building of plaintiff which stood next to the bridge, stood over Mill creek; this building at first stood on the south bank of the creek; after the bridge was built, and before the flood, the plaintiff built an addition to that building, extending it across the creek, so that the creek ran under it; the embankment and bridge was all built in the fall of 1831 and winter of 1832; the wooden bridge could not stand the press of water which came through the canal culvert; the rapidity of the current would take the bridge with it. The ravine that witness has spoken of, runs across Rotterdam st. before it enters the Binnie kill; some of the plaintiff's buildings were not over a foot from the surface of the ground; the bridge was rebuilt immediately after it was carried off, with some timber that was in the first bridge. Witness has not lived at Schenectady for the last six years. Witness helped build the Church street bridge; there was only one mud sill and one tier of posts, each side of the creek, in that bridge; the ends were planked up for the embankment to rest against; there are two culverts across Mill creek, at Washington and Water streets; don't know the

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size of those culverts; they are greatly less than the span or opening of this bridge. The building of plaintiff that stood next to the bridge was a barn, formerly; it had been moved to make way for the track of the rail road, and fitted up as a curry shop; the greatest part of this building stood on the south side of the creek; the wing or addition that was built, extended over to the other side of the creek; the floor of that building was not two feet above the surface of the ground; all the rest of plaintiff's buildings were below this one. The next morning after the bridge was taken off, witness saw a large canal boat lodged in one of plaintiff's buildings. When witness was at the bridge at 9 o'clock the night before, the water was rushing under the bridge and against the wing of the building that run across the creek. The building that he saw the canal boat in, the next morning, was a store on Water street on the north side of the creek. There were great quantities of ice thrown over the canal by this flood. Witness thinks this ice must have been made in the river; some might have been made on the flats south of the canal. The swale or ravine spoken of crosses Rotterdam street over the Fuller lot. The plaintiff rebuilt his buildings on the site of those that were carried off, and as much exposed to floods as the first ones were.

On being reexamined, the witness further testified that the barn that was turned into a currier shop, stood flat on the ground, but it was raised up a little when it was repaired, after the bridge was built. One of the buildings that was put up by plaintiff after the flood, was built of brick; thinks some of the buildings that were built afterwards had stone foundations; they were all burned down in 1835. Some of plaintiff's buildings stood where they had stood for years, others had been moved from the track of the rail road. After the water passed the rail road bridge, it took a course toward the ravine, south of plaintiff's buildings; witness found the wrecks of the bridge, witness's shed, and one of plaintiff's buildings in that direction, on Abram Switz's lots, on the corner of witness's and plaintiff's lots. Witness thinks if the embankment had not been made at all, the water would have run off by the ravine. Before the rail road embankment was made the greatest flood was along the ravine, and passed off south of Brown's buildings. The embankment

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caused the water to flow off in the direction of Brown's buildings; there was no other place of escape for it. The second bridge was strengthened by having boards put up against the posts to secure the embankment. The boards were placed against the inner posts and the bank came against them; wing boards were also run out to prevent the bank from being washed away.

Joseph Gillespie, testified on the part of the plaintiff, that he was in plaintiff's employment in 1832, and was present when the rail road bridge went off; it went off between twelve and two o'clock at night; the water was on the top of the bridge when it went off; when the bridge went off it struck plaintiff's buildings, and took them with it. The building immediately below the bridge extended across Mill creek, and was eight or ten feet from the west side of the floor of the bridge; plaintiff had a tan yard on the bank of the creek below the bridge; there were hides in the vats; these vats were under the building next below the bridge; that building was formerly a barn; it was moved from where the track of the road now is, and placed over the vats in the tan yard; this building was underpinned with stone, so as to level it; it was raised a little from the ground, and witness thinks a little higher than it was before it was moved; another building was also moved and joined to this, and underpinned like this, and those two, with an addition that was built to them, were fitted up and used as a tan house and currying shop. These two buildings, before the addition was built, did not extend across the creek; they were on the south side of the creek, the side towards the canal; the plaintiff erected an addition to this building, which extended across the creek; this addition consisted of two or three bents, and was placed on a stone foundation. The part of the building formed by his addition was used as a currying shop, and the old part of the building which was over the vats was used as a tan house; the foundation of the addition that was built, was on a level with the old building to which it was added; the buildings stood higher after they were moved; all the buildings went off together; none of them moved before the bridge struck them. Witness thinks the bridge would have struck the buildings if the addition, extending the tan house and currying shop across Mill creek had not been built. Plaintiff had buildings

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over the creek before the rail road was made; don't know that they ever received any injury by flood before 1832; the buildings that stood over the creek before 1832, were a bark-house and beam-house; one of these buildings was standing over the creek when witness came to live with plaintiff in 1821 or 1822; the other was built in 1828, or about that time. The water raised higher after the bridge went off, than it was at the time it went off; witness thinks as much as two feet higher. The new buildings that plaintiff erected after the flood of 1832, near Mill creek, were placed on stone foundations, laid in mortar, as high as the surface of the rail road embankment; if his memory serves him rightly some of the new buildings extended across the creek, and were placed on same foundations. Witness has seen high water before 1832; it set back up Mill creek and spread over the flats, when it got so high as to overflow the banks of the creek. When the ice gave way at the Mohawk bridge, the water would fall. The strongest current of water that witness observed was at the ravine; none of the buildings of plaintiff were then in danger. Witness has no recollection of the river damming at the islands before 1832; has known the water run from the south side of the canal through Mill creek culvert, but witness supposed it was water that had set back through the culverts above. Witness has seen the water run back up the creek with great rapidity; has known it rise three feet on the flats in an hour; it set up with a strong current.

This witness then further testified in relation to the property injured and the damage done thereto, which is omitted for the reason before stated.

Upon his cross-examination, the witness further testified that the floor or bottom of the tan house and curry shop, the building next the bridge, was about a foot from the surface of the ground; the underpinning was loose stone, a dry wall; the building next below this and adjoining it, was occupied as a barn. Witness stood in Water st. on the track of the rail road when the bridge went off; the water was over the floor of the bridge; witness does not recollect whether there was any current running over the bridge; the water was 3 or 4 inches higher than the top of the bridge; the top of the bridge was as high as any part of the rail road;

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the water was on the top of the rail road at other places; there was some water on Water street where witness stood; Water st. is eight or ten feet higher than the bottom of plaintiff's buildings; standing on Water street where witness did, he could see both sides of the rail road embankment; should not think the water was quite as high on the west or lower side as on the other side; witness thinks there was about a foot difference; witness could see the water on each side of the embankment clear to the canal; Mill creek was running down towards the river then; the water was four or five inches high on the top of the bridge, and was very near as high on the lower as on the upper side of the bridge; some part of this water came through Mill creek culvert under the canal, and some part of it run over the canal. Witness saw one canal boat and one scow come down before day light, after the bridge went away. The canal boat came down before the scow. Ice in large chunks also came down rapidly. Witness came down to the bridge between ten and eleven o'clock at night. When the bridge went off, the end next to Water street, where witness stood, gave way first; that end went down stream and struck with great force the addition or new part of the curry house that had been built across the creek, and which was eight or ten feet below the bridge. When the bridge struck it, the whole building started, and the bridge and building all went down stream together. The bridge would have struck the main building if there had not been a building over. The building on the south side of the creek next below the tan house and curry shop was a barn, and stood ten or fifteen feet back from the bank of the creek, and was about sixty feet below the bridge. The old part of the tan house and curry shop also stood ten or fifteen feet south of the south wall or bank of the creek. Witness don't recollect what building was next to the barn on the south side of the creek; on the north, or Water street side of the creek, the building next below the curry shop was a lime-house, and stood ten or fifteen feet back from the bank of the creek, and was between forty and fifty feet below the bridge; next below the lime-house, on the same side of the creek, was a store, which stood within ten feet of the bank of the creek; part of that went off; the building next below the

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store was a dwelling house; it was not carried off. Witness don't recollect whether the ice came down before the bridge gave way or not. Witness recollects of seeing the water whirling on the upper side of the bridge, but not below. The curry shop which extended across the stream was boarded up, so that the water would have to run under it, to pass below it; this building was forty or fifty feet wide up and down the stream, and was of the same width clear across the creek; the second story of this building is the curry shop; the lower story is the tan house or tan yard; it covers the tan vats and a beam house; the vats were on the south side of the creek, and the beams where the beaming was done, on the other side. Witness was in the curry shop in the fore part of the evening, left it about 9 o'clock and went home, then came down to the bridge between 10 and 11 as before stated; when witness left, the water was not very high, but was rising; when he came back, between 10 and 11, it was so high he could not get into the curry shop, and was running pretty rapidly down towards the river. Witness went up the rail road to the canal; witness's impression is that the water was running over the canal a little, near the rail road; did not go up the canal to Mill creek. When witness came back to the rail road bridge, the water was near up to the plank of the bridge. When going along the rail road to the canal, witness recollects of seeing the water on each side of the rail road embankment. Witness judged it was as high into a foot on the west or lower side as on the other side. Witness went a short distance along the canal; can't say how far; thinks he saw the water running over the canal near the culvert. The whole country south of the canal was then filled with water. The water was near the planks of the bridge when it first began to run over the canal. It had come through the canal culvert and had backed up Mill creek. The next morning witness saw three places where the water from the south side of the canal had run over and broken the canal away; one near the city, another near Mill creek culvert, and one near Rotterdam bridge.

Witness returned from the canal back across the rail road bridge and staid there till the bridge went off; was there when the water rose over the top of the plank on the bridge. Witness

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does not recollect of seeing the canal boat come down before the bridge went off; thinks the canal boat came down after the bridge went off.

On being reexamined, the witness further testified that two of the plaintiff's buildings covered the creek before the rail road was made; one where the track of the rail road now is; sills were laid on the wall of the creek, and the floor of the buildings on those sills; one of those two buildings was a wood house; don't know whether this wood house has been moved since the rail road was made. There was a road between the barn and tan house; there were other buildings below the barn; the wood house was a wood shed standing over the creek, underpinned with loose wall so as to make it level, if he recollects right. The witness then testified to the correctness of a map produced on the part of the plaintiff, a copy of which is hereto annexed.

John Kelly testified on the part of the plaintiff, that he is a carpenter; saw the bridge when it went off. The end next to Water street slewed round down stream and struck the curry shop and it started; all the building did not go off at the same time. The currying shop went off; the bridge broke off a part of the building and caused it to crush down; the water rose higher after the bridge went away than it was when it went off; the current run strong both before and after the bridge went off. Witness never examined the bridge; has heard the description which the witness *Elder* gave of it. Witness has observed the current of the water on the flats.

The plaintiff's counsel then put the following question to the witness: *Was that bridge sufficient, in your opinion, to withstand the floods which you have seen on those flats prior to 1832?*

This question was objected to by defendants' counsel, as illegal and improper, but the objection was overruled by his honor the judge. To which decision and ruling the defendant's counsel excepted.

The witness in answer to said question testified, that in his opinion the bridge was not sufficient to withstand the water that might set up from the river, and what might come through the canal culvert.

Witness has known of ice dams forming at the head of the

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islands prior to 1832; has some recollection of the water coming down the canal three or four years prior to 1832; thinks the canal at that time was nearly filled, almost to overflowing; in case of floods the water passes through the canal culverts above the city and fills the flats on the south of the canal as high as the water on the north side.

The plaintiff's counsel put the following question to the witness: *In your opinion, how should the rail road embankment have been constructed, so as to have protected the plaintiff's buildings?*

This question was objected to by defendant's counsel as illegal and improper; but the objection was overruled by the judge, and the defendants' counsel excepted, and thereupon the witness answered—

That in his opinion a stone culvert over Mill creek would have protected the plaintiff's buildings. It is witness's opinion if there had been a stone culvert there in 1832, the embankment would have broken further up towards the canal. Witness thought so at the time, but very little of the bank had worn when witness saw it. If an opening had been made through the bank, it would probably have saved the buildings.

On being cross-examined, the witness further testified, that he had built several bridges across creeks; two before 1832; that that part of the Mohawk and Hudson rail road which is between the canal and inclined plane was finished a year or two before 1832; the embankment of that part of the road which runs from the foot of the inclined plane across the flats south of the canal to the canal, is as high as the tow path of the canal. That part of the road for which the embankment in question was made, was for the Schenectady and Saratoga road. The embankment of the road south of the canal stopped the water, but was torn away. Witness don't know the size of the Mill creek culvert; nor does he know the size of the opening or water way of the bridge in question. If the opening of the bridge was large enough to pass all the water that could come through Mill creek culvert and the water that might set back up Mill creek, there could be no difficulty in its standing; knows of nothing to be guarded against in building the bridge but the back water and

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the water that would come through the culvert; if the span or opening of this bridge was large enough to pass that water, it would be sufficient: witness does not know the size of the opening or span of Church street bridge across Mill creek. The flood of 1832 tore away the rail road embankment between the foot of the inclined plane and the canal. Ice of the Mohawk river was carried over to the south side of the canal and driven down on to the flats there. When the end of the bridge struck the curry shop it seemed to crush down; the water had just commenced running over the top of the bridge, and there seemed to be a pressure of water under the bridge which raised it up. It was the end of the curry shop next to Water street that crushed down when the bridge struck it. The bridge then passed off below the curry house and lodged among the other buildings of the plaintiff. The part of the curry shop and tan house that was on the south side of the creek, was standing after the bridge had gone off down stream, and remained standing there till witness went away. The bridge did not strike any other building. When witness returned the next morning all of the tan house and curry shop was gone, as witness thinks. Church street embankment is a solid embankment, running parallel with the rail road, and higher than the rail road. Mill creek is not a rapid stream, it is supplied wholly by springs and is not subject to rises except when the water sets up from the Mohawk, in consequence of the ice dam forming at the Mohawk bridge.

John H. Moyston testified on the part of the plaintiff, that he had lived in Schenectady seventy-one years; once owned the property where plaintiff's buildings stood; is acquainted with the character of the freshets of the Mohawk; saw a part of the flood of 1832; he came down to Mill creek below the rail road bridge about noon of the day it went off; saw a canal boat driven into his son's store, that stands on Mill creek, below plaintiff's buildings that were carried off; the store occupied by his son was not carried off; has seen the water higher than it was at this freshet; don't recollect the time; thinks it was thirty years ago; at that time there was nothing to be seen on the flat but one of Daniel Campbell's gate posts. Since the Mohawk bridge has been built the ice generally lodges against it when the river breaks up,

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sometimes so compactly as to obstruct the channel of the river. Has known ice dams to be formed at the head of the islands before 1832; at the head of Van Slyck's island, at a place called Knock-'em-stiff, two miles above the city. Has known the water of the Mohawk river to run down the canal about four years before 1832; it was produced by an ice dam at head of the islands; it then nearly filled the canal and broke out on the east side and run over the canal bank near Doctor Mynders's store. The ravine is two hundred and fifty paces from Mill creek, that takes the water that comes from Judge Veeder's; the water follows this ravine or low ground till it gets to where Brown's orchard was, a little south of his buildings; it then turned and run into Mill creek.

On his cross-examination the witness further testified, that this great flood which he mentioned was in the fall of the year, when there was no ice; never knew such a flood before or since. The swale or low ground which witness means, run to Brown's orchard, then into Vrooman's road, then into Mill creek. Rotterdam street, and Washington street are both higher than Vrooman's road and Water-street. Mill creek is the lowest point on the flats. Witness never knew the ice and flood come down behind the canal as it did in 1832, either before or since; never saw such a flood as that before, except the great flood which he mentioned in the fall.

Plaintiff's counsel then read in evidence, by consent of defendant's counsel, from a copy of the bill of exceptions, taken on a former trial of this cause, as follows, to wit:

"*Abraham Van Ingen*, a witness for the plaintiff being sworn, testified that he is a native of the city of Schenectady; saw the flood in 1832; has seen the water east of defendants' rail road higher than it was then, once in 1814; witness then lived in Washington street; has also seen the water higher previous to 1814; once previous to 1789, when it was as high as Wendell's gate in Mill lane, which was several feet higher than it was in 1832. Since the building of the Mohawk bridge, the ice frequently dams up there, and throws the water back on the flats, and when the ice gives way a strong current is produced; before 1832, the river dammed up to the heads of the islands and the

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water ran into the canal as it did in 1832, but did not break over the banks. The ravine spoken of by the witnesses was the natural channel in floods for the water to take in passing off.

"Cross-examined: Does not know the width of the bridge; does not know of any other water to be provided for, to pass through the bridge than the back water, and that passing through the culvert under the canal; never saw any other before 1832."

The act incorporating the defendants, passed April 17th, 1826, was introduced in evidence, and may be referred to by either party.

A map was also introduced by the defendants, which was proved to be an accurate representation of the plaintiff's premises and the contiguous grounds, and which shows the course and operation of the flood referred to, and the places at which it broke over the banks of the canal, which map may be used by either party, and which is hereto annexed, marked B.

The plaintiff's counsel here rested his cause.

Whereupon the defendants' counsel moved for a non suit, and urged, among other things, in support of said motion:

First. That the gravamen of each of the counts in the declaration was, that the defendants in constructing their said embankment and bridge, had not made them sufficient to pass off the water and ice accustomed to accumulate in Mill creek, and that the evidence clearly showed not only that the bridge was abundantly sufficient for that purpose, but that the injury complained of was occasioned not by any accumulation of the waters or ice of Mill creek, but from the waters of the Mohawk from extraordinary natural causes which could not have been foreseen or prevented, being thrown over to the south side of the canal, and thus rushing down on the south side of the canal, and over its banks at and near the place where Mill creek passed under it, and thence down to the defendants' bridge and plaintiff's buildings, sweeping every thing away in its course.

But his honor the circuit judge held that the third count was broad enough to cover any injury occasioned by any water or ice, whether it was such as was accustomed to accumulate in Mill

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creek, or whether it accumulated or came from any other source, and refused to non suit the plaintiff on that ground.

To which decision the counsel for the defendants excepted.

Second. The defendants' counsel contended that the proof not only wholly failed to sustain the declaration, but that from the evidence it clearly appeared that the loss and injury which the plaintiff had sustained, had not accrued from any cause against which the defendants were bound to guard in the construction of their road, but from an unusual and extraordinary natural cause which no human sagacity could foresee or prevent.

But his honor the circuit judge refused to non suit the plaintiff upon said last mentioned ground.

To which decision the defendants' counsel excepted.

Third. The defendants' counsel insisted that the erection by the plaintiff of the building for his tan house and curry shop, immediately below the bridge and close to it across the said Mill creek, thus filling up the water way of the bridge, so that very little or no water could pass through it, except what could pass in the channel of said creek under said building, was the occasion of the injury he had sustained; at the least it was such a gross act of carelessness and want of common prudence on his part (if it be assumed that such a flood should have been anticipated and guarded against by the defendants), as deprived him in law of all right to recover of the defendants, for an injury arising as much from his own want of care and prudence, as from the want of any care or skill on the part of the defendants in the construction of their road.

But his honor the circuit judge refused to non suit the plaintiff upon all or any or either of said grounds, or any other ground.

To which decision the counsel for the defendants did then and there except.

John I. De Graff was then sworn as a witness on the part of the defendants, and testified that he was one of the directors of the defendants in 1831 and 1832; that he made the contract for the defendants with the plaintiff, for the land upon which the section of the rail road in question was constructed; the contract was made some time between the months of November 1831 and January 1832, and before any part of the road or embankment

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was constructed. The plaintiff, after the road was constructed, gave the defendants a deed in pursuance of said contract. The deed now shown to witness, dated 29th September 1832, with the map therein referred to thereto attached, is the deed that was given in pursuance of said contract; that said map was attached to the deed when the same was executed, which said deed is in the words and figures following, to wit:

“This indenture, made the 29th day of September, in the year of our Lord one thousand eight hundred and thirty-two, between John Brown of the city of Schenectady, and Rebecca his wife, of the first part, and the Mohawk and Hudson Rail Road Company of the second part witnesseth, That the said party of the first part, for and in consideration of the sum of twelve hundred and fifty dollars to them in hand paid, by the said party of the second part, the receipt whereof is hereby confessed and acknowledged; have granted, bargained, sold, remised, released, aliened and confirmed, and by these presents do grant, bargain, sell, remise, release, alien and confirm, unto the said party of the second part, and to their successors and assigns, forever, all that certain piece and parcel of land situate in the second ward of the city of Schenectady, extending from Water street in said city across the Mill creek, and to the Erie canal, being the piece of land taken by the parties of the second part for their rail road, and the accommodations thereto appertaining and belonging, and known as lot No. 19 in the map of the said company, and particularly laid down in the map hereto annexed, and containing fifty-four thousand three hundred and seventy-three square feet, excepting and reserving out of said number of square feet so much of the surface of said Mill creek as is embraced in said map attached hereto, the surface and right of passage of said creek as the water runs, belonged to Archibald Craig and John Strong, and subject however to this restriction, that neither the parties of the second part, their successors or assigns shall erect in the said road, in front of the remaining ground of the said John Brown, adjoining said road, any fence or building which may obstruct the view from any buildings which the said party of the first part, his heirs or assigns, may erect on said remaining ground, except such fence as is required by the act incorporating

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the parties of the second part, and excepting such buildings as are required for carrying on or facilitating the business of the parties of the second part, together with all and singular the hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, claim and demand whatsoever of the said parties of the first part, either in law or equity, of, in and to the above bargained premises with the said hereditaments and appurtenances. To have and to hold the said above granted and described piece of land excepting and reserving as aforesaid, and subject as aforesaid, to the said party of the second part, their successors and assigns to the sole and only use, benefit and behoof of the said party of the second part, their successors and assigns for ever. And the said parties of the first part, for themselves, their heirs, executors and administrators, do covenant, grant, bargain, promise and agree to and with the said party of the second part, their successors, and assigns, that they, the said parties of the first part, their heirs, executors and administrators, the above bargained premises in the quiet and peaceable possession of the said party of the second part, their successors and assigns, will warrant, and by these presents for ever defend, against all and every person or persons lawfully claiming or to claim the whole or any part thereof.

“In witness whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

[“The word ‘successors,’ interlined once in the first page, and four times in the second page, over the word ‘heirs’ first canceled, with a pen, before execution.]

“JOHN BROWN. [L. S.]

her
“REBECCA + BROWN. [L. S.]
mark.

“Signed, sealed and delivered in the presence of

“S. W. JONES.

“JOHN I. DE GRAFF, *witness to Rebecca Brown's signature.*

“*Schenectady County, ss:* On the fifth day of October, in the year 1832, before me, Samuel W. Jones, a judge of the

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County Courts, in and for the county of Schenectady, personally appeared John Brown, to me known to be the grantor in the foregoing deed described, and he acknowledged that he executed said deed for the uses and purposes therein mentioned, and the material alterations appearing on said deed being noted before such acknowledgment, let the same be recorded.

“S. W. JONES.

“*State of New York, Schenectady County, ss:* On the 18th December 1832, personally appeared before me, Rebecca Brown, the wife of John Brown, one of the grantors within named, who to me is personally known, and who was by me examined separately and apart from her husband, and acknowledged that she had executed the within as her act and deed, of her own will and accord, and without any fear or compulsion from her husband, for the uses and purposes therein mentioned. I do allow the same to be recorded. Dated Schenectady, 18th December 1832.

JOHN I. DE GRAFF,

Mayor of the city of Schenectady.

“*State of New York, Schenectady County Clerk's Office, ss:*

“Recorded December 4th, 1832, at 11 o'clock, A. M., in Book I. of Deeds, pages 590, 591, &c.

“JOHN S. VROOMAN, *Clerk.*”

A copy of the map referred to in, and attached to said deed, is hereto annexed, marked C.

The witness further testified that the engineers of the defendants had located this section of the road, and surveyed and made an accurate description of the land that would be required to construct it, before the contract for the purchase of said land was made with plaintiff, and that said contract was made with reference to said location, survey and description. Plaintiff was very anxious to have the road located where it was. There was no agreement or understanding with plaintiff that defendants should build either a culvert or stone bridge across Mill creek. After the contract was made and while the road was constructing, witness had a conversation with plaintiff about the bridge across Mill creek; he wanted a stone bridge so that he might use the parapet wall as a part of a foundation for a building; he said it would save him the expense of building one wall; but he never

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pretended that he wanted a stone bridge for any other reason, or that it was necessary for the safety of his buildings, or that the defendants had agreed to build a stone bridge.

Witness has lived in Schenectady for sixty years; there is no such ravine or swale running through those flats as Mr. Elder and the other witnesses have described, nor has there ever been to witness's knowledge; witness owns land through these flats from Rotterdam street to the rail road, and has for a long time; the only ravine there ever was is a small ditch made by a plow, which carries off the drainage from the canal in the spring, and that was made since the canal has been constructed; in the summer that ditch is dry and potatoes are planted in it; witness never knew or heard of any other drain. Witness's land is the lowest part of those flats; the water from the canal runs over witness's land and under Rotterdam street through a small culvert. The ditch made by a furrow of a plow before mentioned, is the only ravine there is. Witness's land is the lowest part of the flats; it is all mowed every summer; there are inequalities of surface, some spots lower than others, but no swale or ravine, but the whole flats are either mowed or planted with corn and potatoes. There may be a swale or ravine up towards the Mill creek culvert.

The character of the floods or high water on those flats previous to 1832, was water that was set back from the river up Mill creek, and in that way rose till it overflowed the flats, and then receded as the river fell. The water would generally continue rising from twelve to forty-eight hours, and be about the same length of time receding; sometimes it would rise and fall in a shorter period; the current, when the water was either rising or falling, was seldom of sufficient force to carry off fences; a post and board fence was seldom ever disturbed by these freshets, unless the boards were loose; there are more or less fences disturbed by the floods every year; it depends upon where they are located; if on the bank of the river, they are more exposed; they are in danger from the ice of the river; people frequently take up their fences near the river in the fall.

There are two culverts under the canal west of Mill creek; the first of which is half a mile west of Mill creek, and the other

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a mile west of Mill creek. Witness was so situated that he particularly noticed the flood of 1832. Witness was on the bank of the canal from a quarter before ten until after eleven o'clock, the night of the flood; at a quarter before ten the water was running over the north bank of the canal on to the flats below, a few feet east of the rail road embankment. Witness went through that water and went down the canal to Mill creek culvert; the water was running over the north bank of the canal at that place, into Mill creek, in greater quantity; at this time the Mohawk river was not full; the water was not up to the top of its banks at the Mohawk bridge, nor was there any water on the flats between the canal and the river; the water that was running over the banks of the canal at this time, came out of the canal, but in less than an hour from that time, water and ice in great quantities rushed down the south side of the canal, and passed over both banks of the canal near the Mill creek culvert and near the city, and close to the rail road embankment, on to the flats on the north side of the canal; the water came so suddenly that lives were lost; two children of Mr. Gough were drowned at Vrooman's house, and Gough and wife barely escaped. When the flood subsided large cakes of ice were piled on the flats west of the rail road embankment, south of the canal; where the water broke over the canal nearest to the rail road embankment, it delved out the earth more than twenty feet. The water which rushed over the canal run down Mill creek with great rapidity. Witness was Mayor of the city of Schenectady at that time, and was apprehensive that the lower part of the city on Water and Rotterdam streets would be entirely swept off; he ordered the alarm bells of the city to be rung. The current was so rapid below plaintiff's buildings, at Water and Washington streets, that they could hardly be crossed in a boat to rescue the families on the other side; finally a boat was got across. The rail road embankment between the south bank of the canal and the foot of the inclined plane, greatly retarded the water and ice which was rushing down the flats on the south side of the canal; had it not been for that embankment the ice and water would have swept off the whole property of Rotterdam street. Plaintiff's property was as much exposed as any of the property on Rotter-

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dam street. There has been no flood nor freshet like that before; heard there was one like it in 1839.

The waters of the Mohawk river were thrown on to the south side of the canal in this way—in January there was a thaw, and the river broke up and then froze again suddenly, while the ice was floating in large cakes down the river—the ice was thus stopped at the Mohawk bridge, but did not form a dam there; the dam was formed one and a half miles above the city, at the head of the islands, in the river at that place. There was a sudden thaw and great rise of water in March, which broke up the Schoharie creek and the whole force of the ice and water of that creek and of the Mohawk river was thrown by this dam clear over the canal on to the flats on the south side of it, a mile and an half west of the city, and it came down those flats almost in a body, and rushed over the canal again on to the flats on the north side of it, between the rail road and the city. The water in the river at the Mohawk bridge, and in the Binnie kill, fell greatly, and remained low till the water which came down the south side of the canal was discharged into the Binnie kill and river through Mill creek, and from the adjoining flats. The water which was thus discharged into the Binnie kill carried away the ice at the Mohawk bridge. The ice dam at the islands stopped so much of the river that it was quite low at the bridge, and quite a fall below the bridge, until the river regained its usual quantity of water, from the water that thus came down the south side of the canal and run over it into Mill creek and on to the flats on the north side of it, and discharged into the Binnie kill.

On being cross-examined, the witness further testified that the Mohawk bridge was built in 1808; witness does not recollect when it was erected with its present number of piers; the formation of ice dams at the bridge in a thaw is a common occurrence. It is an uncommon occurrence for the river to break up or ice dams to form in January; it has happened several times in witness's recollection; it does not happen oftener than once in five or six years. Schoharie creek empties into the Mohawk twenty miles above the city of Schenectady. That stream breaks up in the winter more frequently than the Mohawk; that stream rises in the Catskill mountains and is a rapid, powerful stream;

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brings down large masses of ice when it breaks up. Has known ice dams form at the head of the islands, without any dam being formed at the bridge; that has been occasioned more from the ice of Schoharie creek, than from the ice of the Mohawk; sometimes such dam is formed so far above the islands that it does not affect the flats in the neighborhood of the canal; when the dam is formed at the head of the islands, the water generally rises so as to run through the culverts under the canal, and overflow the flats on the south side of the canal, then it would run down and pass the Mill creek culvert, which is lower than those above (except in the spring of 1832); a portion of it, however, might run down to Mill creek culvert; that would be the natural course. Witness was not in the city of Schenectady in 1828; was then a member of congress and spent the winter at Washington; for two winters last past the Mohawk has broken up in January.

Witness was not present when the plaintiff's buildings went off; at day light in the morning the basin was nearly full of water; it was within eighteen inches, witness should think, of the top of the rail road embankment; at twelve o'clock there was nothing like so much water in the basin; the water was not quite so high on the west side of the rail road embankment; there was a rapid current through the waterway of the rail road bridge, and then it continued to the river; a boat which lodged on one of plaintiff's buildings, protected it from the ice. The water continued to run over the canal from the south to the north side until about the middle of the forenoon of the day after the bridge and buildings were carried off. The water was not over three or four feet deep on Rotterdam street at any time when witness was there; that street is higher than the ground on each side of it. After daylight the next morning the water was not over three feet high on Rotterdam street. When high water is made on the flats, by the water being set back by a dam at the bridge, witness has seen it as high as six feet on Rotterdam street. Witness never saw the water so high on the flat above the rail road bridge as it was at this flood. It was occasioned by the immense quantity of water which run over the canal on to the flat. In the morning the water was all of eighteen inches

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higher on the south side of the canal than it was on the flats, on the north side of the canal above the rail road bridge; the rail road embankment was made a little higher than the top of the bridge, as it was calculated it would settle a little. The road was not finished at the time of this flood; the rails had not been put on. Witness had stone drawn to make a stone culvert at Mill creek, as plaintiff wished to have it done for the reason before mentioned, and witness wished to gratify him; a few loads of stone was drawn in the fall for that purpose, but that was given up and a wooden bridge built by direction of the engineers.

On being reexamined the witness further testified, that at the time he saw the water six feet deep on Rotterdam street, as stated in his cross-examination, it was occasioned by the water being set back by a dam at the Mohawk bridge; that on that occasion the water rose and receded in the manner related by witness in his direct examination. When plaintiff executed the deed of the land for this road to the defendants, in September after the flood, he made no pretence whatever to any claim against the defendants for damages on account of the loss sustained by this flood; at that time and at the time of the accident, he claimed that the Mohawk bridge company were liable to him for the damages he had sustained.

William J. McAlpine testified on the part of the defendants, that he is an engineer, and has for many years been in the employment of the state as such engineer on the Erie canal. The culvert at Mill creek is a semi-circular culvert; twelve feet chord with abutments two feet high; the area of its waterway is eighty 54-100-square feet; the area of the waterway or opening of the bridge across Mill creek as described by the witness Elder, taking the least dimensions mentioned by him, is 336 square feet; the opening or waterway of the bridge is sufficient to pass three times as much water as could come through the Mill creek culvert. Witness is acquainted with and has had much experience in constructing such bridges and culverts. Witness heard the description of the manner in which this bridge was built, as given by Mr. Elder in his testimony, and the fact stated as to how long it withstood the flood of 1832. There can be no

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possible doubt that the bridge was amply sufficient in all respects to resist and withstand all the force that could be brought to bear upon it from any water which would set up through its waterway by means of ice dams at the Mohawk bridge, and all the water that could pass under the canal through Mill creek culvert.

John B. Jarvis testified on the part of the defendants that he is an engineer; has been in the employment of the state on its various canals for many years, as such engineer. Witness heard Mr. Elder's description of the manner of constructing the defendants' bridge over Mill creek; witness also heard the testimony in relation to its being carried off by the flood of 1832; the waterway of this bridge was much more than sufficient to discharge without obstruction or difficulty, all the water that could be required to pass through it, arising from high water, occasioned by any ice dam at the Mohawk bridge, together with all the water that could pass through Mill creek culvert. The strength of the bridge was amply sufficient to withstand all the force that could be brought to operate upon it from either or both of those sources. Witness is acquainted with the Erie canal and the relative elevation of its culverts; the bottom of the two culverts next above Mill creek culvert, are three feet lower than the bottom of Mill creek culvert. The two upper culverts just mentioned, afford the first outlet for any water that may be on the south side of the canal, when the river falls. Witness was the engineer who had charge of the section of the defendant's road between the canal and Water street; the bridge in question was planned by witness; witness made sufficient provision for all the water that could be required to pass the bridge, either from the water being set up Mill creek, and on to the flats by ice dams, or from any water which could come through Mill creek culvert, or from both of those sources. Witness then believed and still believes the bridge was amply sufficient.

On being cross-examined the witness further testified that the flats adjacent to the first lock, on the canal west of the city of Schenectady, are higher than those near the city, six or eight feet perhaps. There is but a very slight current in the Mohawk river from the head of the islands down to the Mohawk bridge;

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at the head of the islands there is a reef, where there may be a fall of one or two feet perhaps. Witness thinks he contemplated at one time to build a stone culvert for this section of the rail road over Mill creek. The water will be forced through Mill creek culvert with great velocity, if there is a large head of water on the south side of the canal.

Isaac W. Crane testified on the part of the defendants, that he resides in the city of Schenectady; is an engineer, and was the resident engineer of the defendants, having the personal charge of the construction of the section of the defendants' road between the canal and the Mohawk river; the bridge across Mill creek was constructed under witness's superintendence as engineer. The waterway of the bridge was amply sufficient to pass without obstruction all the water that could be set back from the river by ice, and all that could pass through Mill creek culvert under the canal, and amply sufficient to resist all the force that could be brought to bear upon it from both those sources combined. The foundation of Mill creek culvert is nearly the same height as the bed of the creek under the rail road bridge.

On being cross-examined the witness further testified, that witness first contemplated building a culvert over Mill creek, and twenty or thirty yards of stone were drawn for that purpose. Plaintiff complained or was dissatisfied that the bridge was not built of stone. Saw plaintiff's buildings before they were moved to make room for the rail road. The plaintiff had buildings standing across the stream before the railroad was made. There is a descent in Mill creek; Doctor Craig had a mill on Mill creek below the canal; witness understood that Mill had three feet fall; that mill was twenty or thirty rods above plaintiff's buildings; there is some but not much descent from that mill to plaintiff's land; a descent of one or two feet perhaps; there is a mill now where plaintiff's buildings were; it is built across the creek; witness does not know what head of water that mill has.

On being re-examined he further testified, that Doctor Craig's mill stood at the foot of the pond designated on the map given in evidence, and was supplied from that pond; the sides of the pond and of Mill creek are raised all the way to the canal, and built up with stone for the purpose of retaining the water for the use

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of the mill. Witness rebuilt the rail road bridge after this flood, it was built with the timbers of the first bridge, with the exception of a small portion which could not be found; it was built on the same sills, which had not been disturbed by the flood; there was no difference between the strength of the first and second bridge; the second bridge has withstood every flood that has occurred since 1832.

On being again cross-examined, the witness further testified, that the angles of the second bridge might have been filled different from the first.

Jonathan Crane testified on the part of the defendants, that he resided in the city of Schenectady from 1814 until 1833, when he left; returned again to the city in December 1841, and has since resided in said city. Witness saw the flood of 1832; was up all night, except about an hour. Witness was on the bank of the canal between the city and railroad, from 7 o'clock in the evening until half past ten. The water began to rise in the canal between sunset and dark of that day; about 9 o'clock the water was very near to the top of the banks of the canal in the canal; witness called upon the collector and urged him to cut away the banks of the canal above Rotterdam street, as the only means of safety to the people and property on the flats. At 9 o'clock the superintendent of repairs on that section of the canal was sent for; at half past 10, P. M., when I left, the water was then running over the heel path bank of the canal in a thin sheet, for several rods. I cannot say that it run into the basin, but it run out of the canal over the south side. Witness left the canal at half past 10, and returned at 12 o'clock at night. When witness left there was very little water on the north side of the canal where Doctor Craig's mill was; there was very little if any water on the flats at this time. Witness recollects of being on the flats on his way from the canal home, and of notifying the inhabitants that they would be in danger from the water coming down the canal before morning. At 12 o'clock, when witness returned, the water was running in large quantities over the north bank of the canal into Mill creek, and on to the flats adjoining the creek. Before two o'clock, immense quantities of water and large masses of ice came down Mill creek through

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the flats. Witness was not at the canal at this time; was at the lower part of the city. Witness was not at the railroad bridge when it went off. Witness never knew such a flood as this before or since, though he has known the water higher on the flats in the basin formed by the rail road embankment, canal and high ground of the city, but never knew such a quantity of water on the south side of the canal. A year ago last winter the water was higher on the flats and in the basin; it set back then from the Mohawk river; but in the flood of 1832, the water in the Mohawk river was considerably below the top of its banks at the Mohawk bridge, when the water was four feet deep on Rotterdam street.

On being cross-examined the witness further testified, that the Binnie kill was clogged up with ice that had been thrown into it by the flood. For a number of days after plaintiff's buildings had been carried off, according to witness' recollection, the ice dam that formed at the head of the islands four years prior to 1832, did not throw any water into the canal. The formation of ice dams at the Mohawk bridge is a usual occurrence; they occasion a sudden rise of water, and when the dam gives way the water falls rapidly.

Mr. McAlpine was again called by the defendants; testified that in 1831 he took a level of the ground upon which the railroad embankment was built from Water street to the canal. The level was taken upon a base line 4 and 64-100 feet above the bottom of the canal; the top of the bank at Mill creek was 8 50-100 feet below that line; the surface of the water in Mill creek where the bridge crossed it was 17 22-100 feet below that line; at three chains seventy-seven links on the line of the embankment from the south embankment towards the canal, the surface of the ground was 11 20-100 below the base line; at four chains fifty-one links from the last point towards the canal on the line of the embankment the surface of the ground was 8 20-100 feet below the base line; at two chains and sixty links from the last point, which brought him to the foot or base of the canal bank where the rail road embankment joined the canal bank, the surface of the ground was 6 55-100 feet below this base line; the surface of the water of Mill creek at the rail road

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bridge is 10 70-100 feet lower than the surface of the ground where the rail road embankment joins the north bank of the canal; at three chains and seventy-seven links from the creek towards the canal, the surface of the ground is 2 22-100 feet lower than the top of the north bank of the creek.

Cross-examined: Witness has no knowledge that the north bank of the canal is built up with stone.

Here the defendants' counsel rested their defence.

Caleb Tompkins was then called as a witness on the part of the plaintiff and testified, that he saw the defendants' bridge across Mill creek carried off by the flood in 1832. Witness came from the canal on the railroad embankment and crossed the bridge before it went off, and staid there until it went off. There was quite a crowd of people gathered round there. The south end of the bridge went off first; it swung round and struck the first building; they went off together, and all the other buildings went off at the same time. Witness is a carpenter; has lived in Schenectady eight or nine years, and had witnessed the floods of the Mohawk. Saw the workmen building this bridge; *in witness' opinion there should have been a wall to keep the water from washing away the embankment under each end of the bridge. Witness should not think the bridge was sufficient to protect plaintiff's property against ordinary floods.*

The testimony; as to the opinion of the witness, was objected to by defendants' counsel, but the objection was overruled and the testimony admitted by the circuit judge, and the defendants' counsel excepted.

On being cross-examined, the witness further testified that he is now twenty-eight years old; that he began to work at the carpenter's business immediately after the flood of 1832; had never worked at the business before; witness was seventeen years old at the time of the flood, and was then and at the time the bridge was being built an apprentice to the plaintiff, learning the trade of tanner and currier, and worked at that business in plaintiff's tan yard near the bridge; that was the way he saw the men at work building the bridge.

The night of the flood witness went out on the rail road south of the canal, between the canal and inclined plane; that part of

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the rail road embankment gave way at the first culvert through the embankment. While witness was out there the whole flats between the south side of the canal and the hills up which the inclined plane of the rail road ascends, was covered with water; it was the current of the water coming down the flats south of the canal that broke away the rail road embankment which crosses those flats.

Caleb Pierson was then called as a witness on the part of the plaintiff, and testified, that he has lived in Schenectady eleven years; is a mill wright; has built several mills; witness put the wheel into Strong's mill on Mill creek below the rail road bridge; the head of water to that mill is eight or nine feet; sometimes it is down to seven feet; the pond when full sets the water back under the canal through Mill creek culvert fifty rods beyond the canal. The distance from the Mill to the canal is thirty five rods. Witness has noticed the character of the floods in the Mohawk; has seen the water set up Mill creek from the rise of the water in the river when there was no ice dam formed at the bridge, as well as when such dams were formed; has sometimes seen the water set up Mill creek so rapid as to make a horizontal current up the creek of eight feet in a second; there was current enough to carry some kind of wheels; has seen it run through the Mill creek culvert both ways fast. Witness believes he understands the structure of this bridge; has built dams and locks, and is acquainted with the structure necessary to resist water. Witness thought this bridge was not sufficient at the time to resist the water that would come against it from the rise of water in the river and through Mill creek culvert, and not sufficient to protect plaintiff's buildings from such water. Witness thinks the bridge should have been built with larger timbers; that the banks each side of the creek should have been spiled and puddled so as to prevent their being washed away. Witness would puddle with clay. Witness thinks something of that kind should have been done. Witness thinks a stone culvert or an arched stone bridge across Mill creek, would have protected plaintiff's buildings; thinks they would have resisted the flood of 1832. Witness also thinks if there had been an opening in

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the rail road embankment, towards the canal, the current would have gone that way.

After this witness had given the foregoing testimony, and before he was cross-examined, defendants' counsel stated to his honor the circuit judge, that he supposed that it was considered that all of said testimony of said witness, in regard to his opinion as to the sufficiency of the bridge, and as to the manner in which it should have been built, and as to what structure would have protected plaintiff's buildings, &c., was admitted against the objection of said counsel, and subject to his exception to the decision admitting said testimony. Upon his honor the circuit judge stating that he did not so understand it, the counsel for the defendant moved to strike out all of the testimony of said witness after the sentence ending with the words "*acquainted with the structure necessary to resist water,*" as being illegal and inadmissible in any point of view, and even under the rule established by his honor, the testimony of this witness could not be received, inasmuch as the witness was not a bridge builder or an engineer. But his honor the circuit judge refused to strike out said evidence, and held it legal and pertinent evidence in said cause.

To which decision the counsel for the defendants did then and there except.

Upon his cross-examination the witness further testified that engineering is not his business, but he has practiced it some in taking levels. Witness has constructed several bridges. In constructing the bridge in question, witness should not suppose he would be required to make a structure to withstand any thing except the force of such water as might set up Mill creek from the Mohawk river, and such as might flow through Mill creek culvert. Witness does not know the size of the timbers of this bridge, but he thought at the time they were rather small; has seen the bridge that is standing there now. Has seen the Church street bridge across Mill creek, just above this bridge; it was a wooden bridge, but has never noticed it particularly; neither of those bridges have been carried off since 1832. If the opening or waterway of the rail road bridge was large enough to pass all the water that would

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be required to pass it, it would be sufficient. Witness only expressed his judgment, or guessed at the rate at which the water run up Mill creek when he stated it run eight feet in a second. Witness should not consider a current or stream that run only six miles an hour very rapid. It would require a stream to run ten miles an hour to be what he would consider a rapid stream.

The testimony was here closed on both sides.

And thereupon the counsel for the defendants moved his honor the circuit judge to nonsuit the plaintiff on the several grounds urged on the previous motion for a nonsuit, insisting that it was so manifest from the evidence; that the plaintiff was not entitled to recover; that should the jury give a verdict for the plaintiff the court would be bound to set it aside, as against the evidence in the case. But his honor the circuit judge refused to nonsuit the plaintiff, to which decision the counsel for the defendants excepted.

The counsel for the defendants then insisted upon the following positions, as the law applicable to this case, and which should govern the jury in forming their conclusion as to the liability of the defendants, and so requested his honor the circuit judge to charge the jury, to wit :

First—That the only casualties against which the defendants were required to guard by the exercise of ordinary care, prudence and skill in the construction of said bridge, were the flow and re-flow of the water up Mill creek and its adjacent flats from the rising of the Mokawk river, together with such water as might come through the Mill creek culvert from any known ordinary source or cause.

Second— That if the engineers and agents of the defendants at the time they constructed the bridge, exercised common prudence, care and skill in coming to the conclusion that it was amply sufficient to withstand any force or pressure which might be brought to bear upon it from all of the sources or causes mentioned in the first proposition, then the defendants were not liable.

Third—That the defendants had a right, by virtue of their deed from the plaintiff, to build the embankment for that section of their road, without any opening between the canal and the

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bridge across Mill creek, and that the fact that no such opening was left or made in said embankment, was no ground of liability for the injury which had occurred.

Fourth—If the injury to plaintiff's buildings was not occasioned by water that was set up Mill creek from the rise of the Mohawk river, or by the water that came through Mill creek culvert, or by the water from both of those sources combined, the defendants were not liable.

Fifth—That unless the jury should find from the evidence that the bridge would have gone off and carried off the plaintiff's buildings, if he had not erected his building across the stream immediately below and close to the bridge, so as greatly to stop up its opening or water way, the defendants were not liable.

As to the first proposition, his honor the circuit judge charged the law to be as therein insisted by the defendants' counsel.

As to the second proposition his honor stated to the jury that he should charge them that the law was as therein stated.

But the Judge remarked in explaining his views on this point :

That the defendants were bound so to use their own property as not to injure that of others; that in the construction of said rail road and bridge, they were bound to acquire and possess themselves of all the facts necessary to form an accurate judgment as to the requisite strength and structure of the embankment and bridge, as for instance the character of the floods of the Mohawk in former years, and after ascertaining the facts they were bound to exercise such due care and foresight as that their structure should not be the cause of injury to the property of others, so far as ordinary care, skill and foresight could effect that object, and his honor refused otherwise to charge in relation to said second proposition.

To which charge and refusal the counsel for the defendants excepted.

As to the third proposition his honor refused to charge as therein and thereby requested; but charged the jury in relation to said proposition, that he agreed to this proposition provided the jury should think the plaintiff's property below could be adequately protected without such opening or culvert in the embankment; but that if they should be of opinion that common

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prudence and forecast would require a culvert in the railroad embankment between the canal and the bridge over Mill creek, in addition to the bridge, to protect the plaintiff's property from the effects of such floods or high water as might, at the time the bridge was constructed, be expected to occur, the omission to make such culvert would render the defendants liable.

To which refusal and charge in relation to said third proposition, the counsel for the defendants excepted.

His honor the circuit judge also refused to charge in conformity with the defendants' fourth proposition, but charged the jury in relation thereto that if the said bridge was not sufficient to protect the plaintiff's buildings against the previous floods produced only by water setting up Mill creek and coming through the canal culvert, and if the structure which ordinary care and prudence required to be erected for the protection of plaintiff's buildings against such floods, would have protected these buildings in the flood of 1832, then the plaintiff was entitled to a verdict; that he thus understood the doctrine laid down by the Court for the Correction of Errors in this case, on appeal in the opinion of the chancellor.

His honor also, in regard to the fifth proposition, charged the jury in relation thereto as follows, to wit:

That said fifth proposition was substantially true; but that, although the jury might find that the erecting the plaintiff's buildings across the creek and near the bridge, was the immediate cause of the going off of the bridge, and thus of the plaintiff's buildings also, yet if they also found that the bridge was insufficient within the principles laid down in the charge relating to the first and second of the defendants' propositions, and would have for that reason been swept off by the flood of 1832, and thus carried off the plaintiff's buildings, if there had been no buildings erected across the stream below the bridge, and no such impediment created to prevent the free passage of the water off below the bridge—then the plaintiff would be entitled to recover—and with this exception or modification the fifth proposition was correct.

To which charge in relation to said fifth proposition the counsel for the defendants excepted.

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Under which charge and instructions his honor submitted the cause to the jury, who found a verdict for \$5,807.41 for the plaintiff, with six cents costs.

At the May term, 1845 of the Supreme Court, the case and bill of exceptions, which had been previously argued, was decided, and a new trial *denied*.

The following is the opinion of the Supreme Court.

BRONSON, Ch. J.—A witness must speak to facts; his opinions are not evidence. Such is the general rule. But there are exceptions. On questions of identity, handwriting, value, and, perhaps, some others, where, from the nature of the case, it is impossible to lay all the facts affecting the question before the jury. Any competent witness, having knowledge on the particular subject, may give his opinion. And witnesses skilled in any art, science, trade or business may give their opinions on questions of skill in their particular calling. It cannot, I think, be denied, that the proper place, as to form and materials, for the construction of this bridge, was a question of art, upon which the opinions of experts might be received. But the argument for the defendants is, that the plaintiff did not call that class of witnesses. The argument is well founded, in point of fact, as to most of the witnesses. So far as it appears, Benedict was not an engineer, nor was he a bridge builder, or a mechanic of any kind. The witnesses, Elder, Kelly and Tompkins, were carpenters; but there was nothing in that employment which qualified them to give opinions on the question whether this bridge should have been built of stone instead of wood; nor had they any peculiar knowledge in relation to the necessity of a culvert in the embankment. Hydraulics and engineering are not part of the necessary education of a carpenter. Elder built the bridge; but he only followed a plan which was furnished by the defendants' engineer. It does not appear that bridge building was his calling, or that he had any peculiar knowledge in relation to that business. Pierson was a millwright, who had built several mills; he had also built dams and locks, and was acquainted with the structure necessary to resist water. He must, I think,

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be regarded as possessing the requisite skill to qualify him to give an opinion upon the sufficiency of the bridge. In relation to the four other witnesses, the only ground upon which the ruling of the judge can be supported, is, that the objection taken on the trial, went to the nature of the evidence, and not to the qualification of the witnesses. When opinions were called for, the defendants objected that the evidence was illegal and improper: that undoubtedly turned the attention of the judge to the question whether this was a case for receiving opinions; and not to the enquiry whether a proper foundation had been laid for receiving the evidence from these witnesses.

The specific objection that they were not experts, or men of skill, was not taken; and we can not allow an objection to prevail here which was not made at the proper time.

The engineer who had charge of the construction of the bridge and other works, was the defendants' agent or servant, and proving what the plaintiff said to him at the time about the sufficiency of the bridge, is not open to the objection that it was proving what had passed between the plaintiff and a stranger to the defendants.

The third count of the declaration was clearly broad enough to cover the case which the plaintiff made by his proof; and the objection for alleged variance was properly overruled.

After what has already been settled as the law of this case, by the Court of Errors, it would have been improper to nonsuit the plaintiff on the ground that there was no evidence tending to support the action. There was proof enough to carry the cause to the jury. Whether the plaintiff was chargeable with negligence in the manner of constructing his buildings, and so caused or contributed to the injury of which he complains, was a question of fact for the jury; and the judge was right in not taking it from them by ordering a nonsuit.

The defendants submitted five propositions, on which they requested the judge to charge the jury. In relation to the first and second points, the judge gave the desired instruction. But he added some remarks in relation to the second, which the defendants think objectionable. The remarks were of a general

nature, and I do not see that they are open to any legal exception.

The fact that the defendants had purchased the land for the road-way from the plaintiff, did not authorize them to construct the embankment in a manner which would not have been proper, had the title come from any other source.

The plaintiff sold a part of his land, knowing it was purchased for a road; but he did not sell the right to use the land granted, in such a way as to do an unnecessary injury to his remaining property.

There may be some difficulty in saying that the response of the judge to the fourth proposition, submitted by the defendants, was entirely correct, but I think with the circuit judge, that it must be regarded as substantially "the doctrine laid down by the Court for the Correction of Errors, in this case."

The answer of the judge to the fifth proposition, like that to the fourth, left it to the jury to speculate upon a doubtful matter, but if that was right in the one case, I do not see that it was not equally right in the other. And, besides, the proposition itself is open to an objection of the same nature as that which is urged against the answer of the judge.

On the whole, although there is ground for doubt whether the defendants are chargeable with the want of ordinary care or skill, I see no clear ground upon which we can disturb the verdict.

New trial denied.

The defendants thereupon sued out a writ of error and brought up the judgment of the Supreme Court, on the second trial, to the Court for the Correction of Errors.

The cause was argued in the Court of Errors in July, 1846, but not decided for want of a quorum voting.

On the first Monday of July, 1847, by operation of law, under the amended constitution (1846), the cause was transferred to and vested in the Court of Appeals. And was argued in the latter court at the September Term, 1847.

Marcus T. Reynolds, counsel for plaintiffs in error.

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First. The circuit judge improperly admitted the testimony of Benedict, at folio 83; of Kelly at folios 135, 137 and 138; of Tompkins, 213; and of Pierson, folio 218 (*folio* 199; 3 *Kent*, 440, 441; *Angell Water Courses*, 100, 101, 3d ed; *Laws* 1826, p. 289, § 11; 4 *Peters*, 80; 5 *Peters*, 198, *general provision*).

Second. The judge should have excluded the evidence admitted at folio 93. It was irrelevant and calculated to mislead the jury.

Third. The testimony objected to at folios 95 and 96, should have been excluded for the reason assigned by the plaintiff's counsel.

Fourth. The circuit judge should have directed a non suit as requested, at folios 153 and 224.

Fifth. The judge should have charged the jury as requested by counsel, at folio 225.

Sixth. The judge erred in his modification, explanation and qualification of such parts of the charge requested by the defendants, and acceded to by the judge, so as to deprive the defendants of the benefit of all the ruling in their favor, and by leaving the matter to the jury in an unintelligible manner.

Azor Taber and Joshua A. Spencer, counsel for defendants in error.

First. The decision of the Court of Errors, made in this case on the 28th December, 1842, establishes the proposition that the testimony of the plaintiff below, was sufficient in point of law to authorize the jury to find a verdict against the defendants below, and that the Supreme Court would not have been justified in setting aside the verdict found upon such testimony (see the opinions delivered in Court of Errors).

This disposes of the defendants' second ground of non suit (folios 155 and 224 of the case).

The verdict must therefore stand, unless the judge has committed an error in law, in some of his decisions in relation to the admission or rejection of evidence, or in his refusal to non suit the plaintiff, or in his charge to the jury.

Second. The decision of the Court of Errors establishes the proposition of law as applicable to this case: "That if the bridge was not sufficient to protect the plaintiff's buildings

against the previous floods produced only by water setting up Mill creek, and coming through the canal culvert; and if the structure which ordinary care and prudence required to be erected for the protection of the plaintiff's buildings against such floods, would have protected these buildings in the flood of 1832, then the plaintiff was entitled to a verdict."

This proposition was contained in the charge of the judge in relation to the 4th proposition of the defendant's counsel (folio 232).

There was no exception to the refusal of the judge to charge in conformity to this proposition, or to his charge in relation thereto (folios 232 and 233). And no objection can therefore be now taken to such refusal and charge (see opinion of Chancellor, pp. 1, 2; opinion of Bronson, J. folio 254).

Third. The jury have found by their verdict, the facts and the only facts held to be necessary by the Court of Errors to entitle the plaintiff below to a verdict, viz: 1st. That the defendants below were guilty of negligence in the construction of their embankment and bridge over Mill creek. 2d. That the destruction of plaintiff's buildings was the necessary result of such negligence. And 3d. That the property of the plaintiff would not have been destroyed by the flood of 1832, if the bridge had been so constructed as to render the plaintiff's buildings safe as against such freshets as might reasonably have been anticipated (opinion of Chan. pp. 1 and 2; opinion of Pres. Bradish, p. 4; opinion of Sen. Franklin, pp. 6, 7).

Fourth. The judge's charge in relation to the 5th proposition of the defendants below (folio 228, 233, 234), was a mere corollary from the principle of law decided by the Court of Errors, and reiterated in the charge of the judge in relation to the 4th proposition (folio 232). The charge was correct, and was in strict conformity to the 5th proposition. The modification of the same by the judge did not conflict with the proposition. And the proposition itself is open to an objection of the same nature as that which is urged against the answer of the judge. (opinion of Bronson, J. folio 255).

As the plaintiff below had buildings standing on the walls of the creek, and over the creek, for several years previous to, and

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at the time of the construction of the defendants' road (folios 79, 108, 109, 119, 120, 114, 134, 135, 122, 200; maps, schedules A and B), he had a legal right after the construction of the road, to use his buildings in the same or in a like situation in which he had been accustomed to use them before the road was made; and the defendants below were bound so to construct their embankment and bridge, as to protect these buildings in the same situation they were in before the road was made, and also other buildings which should afterwards be placed by the plaintiff in a like situation.

The plaintiff below had a perfect right to enjoy his property in the same manner after the road was made, as he had been accustomed to enjoy it before the making of the road. Of the manner of this enjoyment by the plaintiff, the defendants had notice at the time of the construction of their road, as the building next below the bridge at the time the construction of the road was commenced, stood in the track of the road and on the walls of the creek (folios 117, 119, 120, 134, 135. *Lasala v. Holbrook*, 4 *Paige*, 169).

In this view of the case, the defendants below were guilty of negligence in increasing the water way above the walls of the creek, and in erecting a solid embankment from the creek to the canal, thereby directing the whole volume of the water against the plaintiff's buildings. And if by this concentration of the water the plaintiff's buildings were carried off, although they were so carried off without any agency of the bridge in producing that result, the defendants below would be liable for the injury sustained (*The Lehigh Br. Co. v. The Lehigh C. & N. Co.*, 4 *Rawle*, 25).

Fifth. The judge charged the jury as requested by the defendants below, that the law was as stated in the defendants' 1st and 2d propositions (folios 226, 228, 229).

Sixth. The judge charged in relation to the defendants' 3d proposition, which proposition was, that the deed from the plaintiff below to the defendants below, authorized the latter to build their embankment without any opening therein, was correct. And this is the only part of the charge left open for discussion by the decision of the Court of Errors.

The Legislature had no power to grant to the defendants an

If common prudence required a culvert in the embankment between the creek and the canal, to protect the plaintiff's buildings from the effects of such floods as might then have been anticipated, the omission to make such culvert, rendered the defendants liable for the injury which had occurred, and the deed from the plaintiff to them could not excuse them from such liability.

The deed conveyed no greater rights to the defendants than they would have acquired by an appraisalment under their charter.

The deed was a mere substitute for the appraisalment.

But the defendants can claim no benefit from the deed. It was not executed till after the flood, and the occurrence of the injury to the plaintiff's buildings (folios 160, 167). And proposition 3d, and the exception to the charge in relation thereto, is inapplicable to the case.

When the embankment and bridge were constructed, the defendants had no title to the track of their road. And they of course had no right to erect an obstruction to the passage of the water to the river. The terms of the contract for the land were not proved, nor was it proved whether such contract was in writing or by parol.

The land acquired by the defendants could only be used in such a manner as would not injure the property of adjacent owners. The maxim "*Sic utere tuo ut alienum non lædas,*" applies.

The defendants by their charter were required to make a culvert in their embankment in the range of the ravine. They were required to restore all streams of water and water courses crossed by their road to their former state of usefulness. The ravine was a water course (*Laws of 1826*, p. 289, Sec. 11).

The owners of the adjacent lands were entitled to the protection of all the safe-guards from the floods, which they enjoyed previous to the construction of the defendants' road. And the defendants could not diminish or destroy these safe-guards, without being liable for all injuries resulting from their diminution or destruction.

exemption from liability for consequential injuries produced by

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the construction of their road and bridge. Such a grant, as no provision for full compensation is made, could not be sustained. It would be a violation of the Constitution (*Bloodgood v. the M. & H. R. R. Co.*, 18 *Wend.* 1; *Fletcher v. the A. & S. R. R. Co.*, 25 *Wend.* 462; 3 *Paige* 73; 5 *ibid.* 137).

Neither the defendants' charter, nor their contract or deed, gives them any exemption from liability for the consequences of a negligent and unskillful construction of their road.

Upon the maxim or principle, "*Sic utere tuo, ut alienum, non lædas*," most of the actions on the case for consequential injuries are founded (*Panton v. Holland*, 17 *John.* 92; *Lasala v. Holbrook*, 4 *Paige*, 169; *Thurston v. Hancock*, 12 *Mass.* 220; *Brown v. Windsor*, 1 *Crompton and Jervis R.* 26; *per Garrow B.* 1 *Rolle* 430; *Roberts v. Read*, 16 *East*, 215; *Smith v. Martin*, 2 *Saunders*, 394; 3 *Hill*, 193; 1 *com. Dig. action on case for nuisance E (A)*; *Moore v. Brown*, 3 *Dy.* 319, b; 1 *Bac. Ab. action on case F*; 1 *Salk.* 21; 2 *Ray*, 1089; *S. C.* 2 *Ray*, 1091).

The case of *Fletcher v. The A. & S. R. R. Co.*, 25 *Wend.* 462, fully establishes the principle of the liability of rail road companies, for all consequential injuries to owners of adjacent lands.

Seventh. The defendants' motion for a non suit was properly overruled (*folio* 153 to 158).

1st. The first ground of non suit, that the evidence varied from the declaration, was incorrect in point of fact. The declaration was broad enough to cover the injury proved to have been sustained by the plaintiff (*folio* 251). But if not, the declaration can be amended on the argument, so as to conform to the proof.

This amendment can be made either by virtue of the provisions of the Rev. Stat. (2 *R. S.* 424, § 4, 7, 8) or by virtue of the general power of the court, to allow amendments in cases not provided for by the statute (9 *Wend.* 307; 15 *Wend.* 410; 17 *Wend.* 75; 19 *Wend.* 541, 542; 24 *Wend.* 480; 1 *Hill*, 121; 4 *Hill*, 190; 15 *Wend.* 672, 673).

2d. The second ground of non suit was covered by the decision of the Court of Errors.

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3d. In the third ground of non suit, the defendants assume as a fact, what is not warranted by the evidence, and the question in relation to which belonged to the jury to decide. And this question the court could not withdraw from the jury (*folio* 252: *Bell v. McClintock*, 9 *Watts R.* 119; *Lehigh B. Co. v. Lehigh C. & N. Co.* 4 *Rawle* 25; 6 *John.* 90; *Jones on Bail*, 120; 7 *Con.* 500. After the decision of the Court of Errors settling the law of this case, it would have been improper for the judge to have non suited the plaintiff. There was proof enough under that decision to carry the cause to the jury (*folio* 252).

Eighth. The judgments and opinions of the Plaintiff's witnesses, viz: Benedict, Elder, Kelly, Tompkins, and Pierson, were properly received in evidence.

In cases of questions of science or trade, or others of the same kind, where, from the nature of the subject, facts disconnected from opinions can not be so presented to a jury as to enable them to pass upon the question, with the requisite knowledge and judgment, not only the opinions of men of science, or experts, are received in evidence, but also the opinions of all trained observers, who from their observation and experience have acquired a peculiar knowledge of the subject, are given in evidence in connection with facts within their own knowledge, on which they are founded (1 *Phil. Ev.* 290; *Folks v. Chadd.* 3 *Dong.* 157; *Case of Wells Harbor*; *Peake N. P. C.* 25, 43; 2 *Stark N. P. C.* 258; 4 *Espi. N. P. C.* 145; 12 *Moore*, 148; 1 *Car & Payne*, 70; 9 *Car & Payne*, 601; 10 *Bar & Cres*, 527; 1 *Camp N. P. C.* 117; 4 *Term. R.* 498; 10 *Bingh.* 56; 7 *Wend.* 72; 1 *Paige*, 173; 4 *Cow.* 355; *Trelawny v. Coleman*, 2 *Star* 191; 23 *Wend.* 433, 356; 4 *Conn. R.* 208, 209; *Grant v. Thompson*, 3 *Mass.* 330; 9 *Mass.* 225; 11 *Ser. & Rawle*, 141; 7 *Ser. & R.* 90; 23 *Wend.* 432).

But if the opinions of any of the plaintiff's witnesses were not legal evidence, this objection can not now be taken; and the ruling of the judge in receiving such opinions as evidence can be supported, because the objection taken on the trial, went to the nature of the evidence, and not to the qualification of the witnesses.

When the opinions of the witnesses were called for, the

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defendants objected that the evidence was illegal and improper; not that the witnesses were not men of science or skill, that they were not experts, and therefore, for this cause, could not give their opinions.

The objection was, that all opinions were inadmissible as evidence; not that these particular witnesses were not qualified (not being experts) to give opinions.

This turned the attention of the judge to the question, whether this was a case for receiving opinions; and not to the inquiry whether these witnesses were qualified to give opinions.

The specific objection that they were not experts, or men of skill was not taken. Not being taken at the proper time, it can not prevail here (*folio* 250; 1 *Cow.* 622). The party excepting must lay his finger on the point which arises in admitting or denying evidence (23 *Wend.* 316; 12 *Wend.* 504; 9 *Wend.* 109; 1 *Wend.* 418; 1 *Hill*, 91).

Ninth. The evidence of what the plaintiff said to the engineer of the defendants (who had charge of the building of the bridge) at the time of its construction, about its sufficiency, was properly received. The engineer was the agent of the defendants.

This was not proof of any thing that passed between the plaintiff and a stranger to the defendants (*folio* 251). This same testimony was given by Crane (witness of defendants), without objection (*folio* 199; *Angell & A. Corp.* 299; 3 *How.* 515, 530, *as to mode of excepting*; 17 *Wend* 257; 9 *Stewart & Porter, Al.*, 330).

On the 29th November, 1847, the judgment of the Supreme Court was *reversed*, and a *venire de novo* awarded.

GARDINER, Judge, delivered the opinion of the court, as follows:

GARDINER, J.—This was an action on the case brought by Brown against the plaintiffs in error for negligence in the construction of a bridge and embankment; in consequence of which his buildings were carried away by a freshet. Upon the trial, Ephraim Benedict was called as a witness for Brown, and asked

the following question by the counsel of the defendant in error: "How could the rail road embankment have been constructed so that in your judgment it would have protected the plaintiff's buildings?"

The question was objected to by the counsel for the plaintiffs in error, upon the ground that the *inquiry* was as to the *opinion* or *judgment* of the witness, which was not legal evidence. The circuit judge decided that the *inquiry* was legal and proper, and overruled the objection thereto, and directed the question to be answered.

To which decision and opinion the counsel for the rail road company excepted.

Was the exception well taken, is the question to be determined. "A witness," says the chief justice, "must speak to facts; his opinions are not evidence; such is the general rule." This is undoubtedly true. The presumption of law was opposed therefore to the admissibility of the evidence. As the facts appeared, at the time of the inquiry there was nothing to countervail that presumption. And the court must have intended to decide that the opinion of the witness, whether an expert or not, was competent.

The chief justice remarks that the only ground upon which the ruling of the judge can be supported is, that the objection taken on the trial went to the nature of the evidence, and not to the qualifications of the witness.

I do not so understand the objection. The objection was that the opinion of *the witness* then under examination was not legal evidence. The chief justice changes the form of that objection, and supposes the counsel to insist that evidence of opinion from *any* witness was illegal. This would be, undoubtedly, an objection to the nature of the evidence. And is a very different proposition indeed from insisting that the opinion of the particular witness is inadmissible. The first would be the unqualified assertion of a proposition not universally true, and therefore false in point of law. The latter (which is the objection taken at the trial) points with sufficient distinctness to the incompetency of the witness. As there is no evidence that the witness was an expert, but the contrary, I am of the opinion that the

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exception was well taken, and that the judgment of the Supreme Court should be reversed.

Objections of the same character were taken to the testimony of other witnesses similarly situated.

The case of *Benedict* has been selected not because it differs in principle from the others, but because the manner in which the objection was made was the least obnoxious to criticism.

For Reversal.—JEWETT, CH. J., GARDINER, JONES, GRAY, and JOHNSON, Judges, on the sole ground that the witnesses were not *experts*, and should not therefore have been allowed to give their *opinions*.

For Affirmance.—BRONSON, RUGGLES and WRIGHT, Judges, dissented, on the ground, that the point that the witnesses were not experts, was not made by the bill of exceptions.

NOTE.—THE COURT OF ERRORS, in this case, appear to have established the following principles:

That *testimony* is insufficient in point of law to sustain a suit, where it would be the duty of the court to set aside the verdict and grant a new trial, if the jury found a verdict in favor of the plaintiff.

But where the testimony is sufficient to sustain a verdict in favor of a plaintiff, if the jury should find one in his favor, the questions of fact should be submitted to the jury. Although the circuit judge may think the evidence leaves the case in so much doubt, that the jury would be justified in finding a verdict for defendant.

The grantees in an important public franchise, should so exercise their privileges and rights as not to injure or impair the rights of others.

It is their duty to exercise such forecast and precaution, in the construction and use of their works, as that the property of others, using ordinary prudence, should remain safe from any danger or injury therefrom.

And where it is alleged that proper precaution, care and prudence have not been exercised and used in and about the construction and use of such public works, it is a proper case to be determined by the testimony of those who are familiar with all the circumstances connected with the location and construction, which are clearly matters of fact, upon which parties litigant have a right to the judgment of a jury.

Held, that the testimony in this case, taken altogether (on the first trial), was of such a character and degree, as fairly to entitle the plaintiff to the verdict of a jury upon it, and that it should have been submitted to the jury for that purpose.

THE COURT OF APPEALS—*Held*, that the *judgments* and *opinions* of the plaintiff's witnesses should have been excluded under the objections made, that the testimony was *illegal and improper*. That the objections went to the *qualifications of the witnesses*, and not to the *nature of the evidence*.

It was not necessary to make the distinct objection, that the witnesses *were not experts*.

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CORNING & HORNER, plaintiffs in error, *agt.* McCULLOUGH,
defendant in error.

Questions discussed.

1. Whether an action brought against a *stockholder* of the Rossie Galena Company, individually, under the act incorporating that company, (*Statutes of 1837, p. 445,*) for goods, wares, &c., delivered to the company, is an action founded upon the *statute*, and in the nature of a forfeiture, or upon the *common law liability* of the stockholder, as upon contract?

2. Whether the statute of limitations—*three or six years*, applies in such a suit?

3. Where the charter of a company contains an *individual liability clause* against its stockholders, to be enforced only after exhausting the legal remedy against the company, or on dissolution, are the stockholders, notwithstanding, liable at common law, originally and primarily, as partners or members of an unincorporated association?

This was an action brought by Corning and Horner against McCullough, as a stockholder of the Rossie Galena Company, for goods, wares, and merchandize sold and delivered by the plaintiffs to the said Rossie Galena Company. A judgment had previously been obtained by the plaintiffs against this company for the same cause of action; and an execution issued and returned unsatisfied. Whereupon this action was commenced against McCullough, a stockholder, on his *personal liability*, under the provisions of the act of incorporation of the company. (*Statutes of 1837, p. 445.*) It is provided by that act, that the stockholders of the corporation shall be jointly and severally *personally* liable for the payment of all debts and demands contracted by the corporation, and that any person having any demand against such corporation, may sue any stockholder or director in any court having cognizance thereof, and recover the same with costs. It is also provided, that before any such suit shall be commenced, judgment shall have been obtained against the corporation, and execution issued thereon, and returned unsatisfied, or that the corporation shall have been dissolved.

The defendant pleaded, (secondly,) that the cause of action

did not accrue within three years next before the commencement of the suit.

To this plea the plaintiffs demurred, and the defendant joined in demurrer.

In the case of Freeland and others v. McCullough, (1 *Denio*, 414,) the same plea was put in by the defendant, (the action being the same;) and the supreme court held that it was a bar, under 2 R. S. 298, § 31. The supreme court in this case followed that decision.

D. Burwell, Attorney and Counsel, and

N. Hill, jr., Counsel for plaintiffs in error.

First. The supreme court erred in assuming that the action in this case was founded upon the act incorporating the Rossie Galena Company, and not upon a *common law liability*, and that it was therefore an action *upon a statute*, within the meaning of 2 R. S. 297-8, § 31. (*Charter, Laws, 1837, p. 445; Another Co. 1837, p. 441.*)

1. Independently of the act of incorporation, the members of the company would be liable for its debts as partners, at common law. (*Collyer on Part. 614, 626, 635, 651, 653.*)

2. The legislature, in incorporating the company, expressly refused to exempt them from their common law liability as partners. The charter virtually holds this language to the members: "You may have a corporate capacity for the convenience of transacting business, and the facility of transferring your respective interests in the joint concern; but you shall *remain* liable to the creditors of the association in *the same manner*, substantially, as though you had *not been incorporated.*" (*Hop. Ch. 300, 304; 19 J. 474; Sess. Laws of 1837, 445-6, §§ 9, 10; 2 Denio, 119, 123-4; Harger v. McCullough, 2 Hill, 268, 269, 270, Moss v. Oakley; 3 Hill, 188, 190, Bailey v. Bancker; 26 Wend. 43, 51-2; Van Hook v. Whitlock; 20 Wend. 614, 617, Ex parte Van Riper; 3 H. 190; 3 H. 41; 7 H. 576.*)

3. The action, therefore, is not founded *upon a statute*, but upon the *common law liability* of the defendant to pay for goods sold to the company of which he was a member, he being a *partner*, and responsible as such.

4. Even conceding that the action is founded partly on the act of incorporation, and partly on the common law, which we deny, still the case would not be within 2 R. S. 298, § 31. (26 W. 51; 7 Paige, 380-1, *Van Hook v. Whitlock*, per Walworth, *Chancellor*; 3 P. 410.)

Second. The supreme court have virtually decided in this case that all *statutory* remedies by action, except those which are given to the people, or a common informer, are embraced by 2 R. S. 298, § 31. This construction will extend the provision to various actions which were plainly not contemplated by the legislature, and is therefore erroneous.

1. Take, by way of example, the following actions, which are mere creatures of the statute, unknown to the common law, viz.:

Actions by and *in the name* of the endorsee of a promissory note, against the maker. (12 J. 93; 10 W. 343; *Stat. 3d and 4th Ann. ch. 9*, § 1; 11 Pick.; *Stat. at Large*, p. 106.)

Actions by and *in the name* of the assignee of a chose in action, where the assignor is dead, and there is no executor. (*See* 2 R. S. 274, § 5, 2d ed.)

Actions by and *in the name* of one purchasing a chose in action at a receiver's sale. (*Sess. Laws of 1845*, p. 73.)

Actions by and *in the name* of an assignee of a bond to the sheriff. (2 R. S. 436, § 56.)

Actions by and *in the name* of the assignee of a lessor, against the lessee, upon covenants in the lease. (1 R. S. 747, § 23.)

Actions against the maker and endorser of a promissory note, *jointly*. (2 R. S. 274, § 6, 2d ed.; 1 R. S. 748, § 26, *use and occupation*; 1 D. 33; 7 H. 86-7.)

Actions by the creditors of a deceased person against heirs, devisees, legatees, and next of kin. (2 R. S. 452, 5, § 32.)

Actions by purchasers of real estate sold on execution, against the owner of the judgment, where the title has failed. (2 R. S. 375, § 78.)

Actions by mechanics against the owner of a building, to enforce a statutory lien for a debt due from the contractor. (*Sess. Laws of 1830*, pp. 412, 413.)

☞ Here *liability* and remedy created by statute. ☞

Actions against the owner of a carriage, for the malicious act of the driver. (1 R. S. 696, § 6; 19 W. 343; 2 R. S. 452, § 32; *Laws of 1837*, 537; *heirs and devisees*, 2 *Williams Ex.* 1201-2; 7 *East*, 128.)

2. The present action is still further removed from the short limitation clause than those adverted to in the above examples; for it is *founded in contract*, and is *given by the common law*; whereas they are purely *statutory* remedies.

Third. The provision in 2 R. S. 298, § 31, was intended to embrace only actions for *penalties* and *forfeitures*, properly so called, and other actions of the *like nature*.

1. The subject matter which the legislature had in view, when they adopted the provisions in *Art. 3d*, of which the above section is a part, was, actions for *penalties* and *forfeitures*. This they have expressly declared. (*See* 2 R. S. 291-2, § 1, *Tit. 1*; 2 R. S. 295, *caption of Art. 2*; 2 R. S. 297, *caption of Art. 3*.)

☞ 2 *Greenleaf's Laws*, 97, § 13, first enacted—never in England; 1 K. and R. 562, § 6, 1 R. L. 186, § 6, 3d art.—all penalties and forfeitures—(ch. 4, commencement)—*for any forfeiture or cause* that is *creating* the forfeiture or cause—It is not action *on a statute* merely—all that follows qualifies and limits—so of other societies *giving* the penalty or action. *Wadsworth Joint Stock Co.*, 2-5—*McCullough's Com. Dic. Company—Broom's Max.* 249, 253-4. Whole act speaks together—read 2d and 9th sections together. One breath legislature—act don't *create* or *give* us the right we seek to enforce. We have it at Com. Law—Leg. incorporated, but without giving exemption from personal liability. ☞

2. The section was introduced mainly to provide for the case of a penalty or forfeiture given to the *party aggrieved*, which was not embraced by the preceding sections of *Art. 3d*. (*See Greenl. Laws of N. Y.* 96; 4 *Mod.* 129; *Cro. Eliz.* 645; *Noy*, 71; 3 *Leon.* 237.)

3. The word "*cause*" was substituted in this section for the word "*penalty*," used in the preceding ones, from a doubt

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whether a statute giving a sum of money or damages, both by way of *remedy* to the plaintiff, and *punishment* to the defendant, could rightly be called a "statute made, &c., for a *penalty*," learned judges having differed upon the question. (*Espinasse on Penal Actions*, pp. 6 to 8; *Hardwick's Rep.* 390, 393, *Merrick v. The Hundred, &c.*; 1 *Wilson's Rep.* 125, 6, *Williams v. Middleton*; 2 *Term Rep.* 154; 8 *Johns. Rep.* 345; 14 *Johns. Rep.* 255; 13 *W.* 265; 3 *Toml. Law Dict.* 520.)

☞ Some judges say, penalty—some not—some say in the nature of a penalty. ☞

4. By using the word "cause," in the unlimited sense ascribed to it by the supreme court, the word "forfeiture" is rendered entirely inoperative. But the legislature having expressly declared that the subject matter intended to be provided for was actions for penalties and forfeitures, the word "*cause*," being general and of doubtful import, is to be limited and applied accordingly. (1 *Blackst. Comm.* 60, 61; 1 *Plowden's Rep.* 203–206.)

5. Again, the word "*cause*," being preceded by the word "*forfeiture*," is to be understood as meaning something of the *like nature*, according to the maxim *noscitur a sociis*. Construed in this way, the section will read: "All actions upon any statute made, or to be made, for any forfeiture or *like cause*," &c. (See *Broom's Legal Max.* 294–5; 5 *Barn & Ald.* 164, *Phillips v. Barber*; 4 *Term Rep.* 224, 227, *Evans v. Stevens*; 2 *Moore* 491, 495, *Clark v. Gaskarth*; 8 *Taunt.* 431, *S. C.*)

☞ Constitution supreme court strikes out the word *forfeiture*. ☞

6. This construction harmonizes with the popular and true meaning of the words "*party aggrieved*," which are never used except in reference to one who has suffered from some *tortious* act or omission of another.

Fourth. The action is embraced by that part of the statute limiting the right of suing to six years. (2 *R. S.* 295, § 18; 3 *R. S.* 702, *Reviser's Notes.*)

1. It is within the express terms of the 4th subdivision of the above section; being an action of "*assumpsit*, or *on the case*, founded on a *contract* or *liability*, express or *implied*."

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2. None of the reasons which induced the legislature to prescribe a short period of limitation for *punitive* or *penal* actions apply to this case. It is an action upon a demand for goods sold, and is entitled to as much favor as other actions of the same general character. (20 *Wend.* 614, *ex parte Van Riper.*)

3. If the supreme court are right, however, the action would be barred absolutely after *three* years, and the plaintiff would be entitled to none of the exceptions on account of disability, absence from the state, &c., which apply to other actions of *assumpsit*, and even of *tort*. (See 2 *R. S.* 296, 7, §§ 24, 26, 27; 2 *R. S.* 298, § 32.)

Fifth. If it be doubtful, upon a view of the whole scheme of legislation on this subject, whether the *three* years' limitation, or the *six*, is applicable to actions like the present, that construction should be adopted which will preserve the remedy the longest. (*Blanchard Limit.* 2-4.)


1. By the common law, a suitor had an *unlimited* time within which to sue, the maxim being that "a right never dies." (*Wilkinson on Lim.* 1, 2.)

2. The "statute of limitations, being in restraint of right, is to be construed strictly;" i. e. so as to *continue* and *preserve* the right, rather than to *abridge* or *destroy* it. (14 *Johns. Rep.* 480, *per Van Ness, J.*; 2 *Bos. & Pull.* 546-7, *per Heath, J.*)

3. "The better construction of a statute is always to expound it as near the rules of the common law as may be." (11 *Mod. Rep.* 150, *Arthur v. Bokenham*; 1 *Saund. Rep.* 240; 10 *Johns. Rep.* 579, 580.)

4. "Statutes are not presumed to alter the common law *further* or otherwise than is clearly expressed." (6 *Dane's Abr.* 589, *pl.* 20; 11 *Mod. Rep.* 150, *Arthur v. Bokenham*; 10 *Johns. Rep.* 579, 580; *Bac. Abr. tit. "Statute"* (1) 4; *Ram on Leg. Judgm.* 160.)

D. BURWELL & N. HILL, JR., of Counsel.

 *Burwell in reply.* *Hist.* 13 sec. 13 *Eliz.*—passed before general statute limitations—Has two clauses of 13 sec. of 1788.—Has been held that where action given *to party grieved*, not within 13 *Eliz.*—Revisers 1788 provided for that case.—


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Meant to provide for case where given to party aggrieved *eo nomine*—no other. (1 *Tidd's Pr.* 13, cites a case)—*cause*—means where limited to *the party aggrieved*—those words must be found with it.

Article 3 and 4, 4 ch., 42, § 3, 1833, provides for actions in favor of *party grieved*.—Cause—means nothing except in connection with what the speaker is saying—don't add or enlarge.—*R. S.* 1st sec., 3d art., expressly enacts that the article is of *penalties and forfeitures*—not of actions given by statute.

This was brought to notice of supreme court on argument there—not noticed in opinion—is conclusive.—No saving clause in this statute, as in general statute in favor of minors, &c., or where defendant out of the state, &c.; 20 *J.* 472, mentioned by Revisers in their notes—must be an action on a particular kind of statute. (*Bull. N. P.* 183.) Two kinds of actions on statute—*Bac. Ab. Action quitam*—did not mean statutes of purely civil character.

At an early day all actions by party aggrieved, he sued *quitam*. (1 *P. Williams*, 687; *Cro. J.* 134.)—reason, because fine due, looking when any statute was violated.—(1 *Ch. Cas.* 204.)—stockholders held personally liable.—Is no adjudged case to the contrary,—I don't say it is law—but there is such a case.—*Ram, Legal Judgm.* 156,—novelty.

Pleading this statute, as in this case is a novelty. 

The case of Freeland and others, plaintiffs in error *agt.* McCullough, defendant in error, was submitted to abide the decision in this case. The same questions in each suit. *George Bowman*, attorney and counsel for the plaintiffs in error, whose points in that case are here inserted. The same attorney and counsel for defendant in error as in the case of Corning and Horner.

First. The limitation of the action in this case was *six* years and not *three*, and the supreme court erred in deciding the contrary, because,

1. The language of the six years' limitation (2 *R. S.* p. 296, sec. 18, *sub.* 1, 2d ed. p. 224) plainly embraces the cause of action in this case, it being debt on "*a liability not under seal.*"

2. The former statute was different, omitting the words "*liability not under seal*;" (see *Laws* 1813, p. 186;) and under the

former statute, the cause of action in the present case was apparently not embraced in the six years' limitation.

3. The case of *Van Hook v. Whitlock* (2 *Edwards Chan. Rep.* 304; 3 *Paige Rep.* 409; 7 *Paige Rep.* 373; 26 *Wend.* 43) arose under the *former* statute. Hence it is plainly no authority here. The whole argument in support of the view of the statute of limitations, taken by the chancellor in that case, was founded on the want of language in the old statute which would enable the court to apply the six years' limitation.

But the chancellor expressly said in that very case, (3 *Paige* 416,) that under the *Revised Statutes* the six years' limitation would apply.

But in fact that case can be held to establish nothing on the question, as it finally was decided on other grounds, and the doctrine now claimed to be supported by it, was in the final decision repudiated. (*Van Hook v. Whitlock*, 26 *Wend.* 43.)

4. Under a similar statute to our former statute, the English courts have held that twenty years' limitation only applied to causes of action founded on statute. (*Jones v. Pope*, 1 *Saund.* 36, 37, *in notes*; see also *Bell v. Bullard*, 1 *Mason*, 243; 1 *Chit. Pl.* 120; *Pease v. Howard*, 14 *Johns.* 480.)

5. It appears that the change in the phraseology of the statute was made for the purpose of applying the six years' limitation to cases like this. (See *notes of Revisers*, 3 *R. S.*, 2d ed., 702.)

Second. The three years' limitation (2 *R. S.* 2d ed. 225, sec. 31; 1st ed. 298) is, in its language, its spirit, and its policy, only applicable to actions for penalties and forfeitures, and things in the nature of penalties and forfeitures.

This is all substantially declared in the title of the article in which the section in question is contained, and in the index of reference to this particular section, and in the general index. (And see the opinion of *Nelson, C. J.*, in *Van Hook v. Whitlock*, 26 *Wend.* 51-53.)

And clearly, upon all the received rules of construction, every word in the section must be kept within the scope of the declared subject matter of the article, and must be construed so as to assimilate and harmonize with the context.

Third. There is nothing in the cause of action in the present

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case in the nature of a penalty or forfeiture. It springs solely from contract. (*Bronson, J., in Moss v. Oakley*, 2 Hill, 268-270; *Cowen, J., in Moss v. McCullough*, 5 Hill, 131; *Hopkins v. Haywood*, 13 Wend. 265, and see fifth point and cases cited.)

Fourth. The judgment below cannot, it is conceded, be sustained, unless by establishing the broad rule that all actions, of whatever nature, founded on statutes, are barred in three years. An examination of various statutory provisions, by which alone certain actions can be sustained, will make it manifest that such a rule was never in the intention of the legislature, and must prevent the recognition of such a rule.

The action for use and occupation of land is given by statute, (1 R. S. 748, sec. 26; *Id.* 2d ed. 739,) and would not lie but for the statute, without an express promise. (*Smith v. Stewart*, 6 Johns. R. 48; *Chit. Pl., Springfield ed. of 1833*, p. 120.)

See also section 27 of same statute, (1 R. S. 748,) which is for a penalty, and no doubt subject to the three years' limitation. (*Beardsley, J., in Wood v. Wilcox*, 1 Denio, 38; and in *Cleves v. Willoughby*, 7 Hill, 86, 87.)

By endorsee in his own name against maker. (*Stat. 3d and 4th Anne*, ch. 9, sec. 1; 11 *Pick. Stat. at large*, 106; *Pierce v. Crafts*, 12 Johns. R. 93; *Wilmarth v. Crawford*, 10 Wend. 343.)

Against maker and endorser jointly. (2 R. S. 2d ed. 274, sec. 6.)

By purchaser at receiver's sale in his own name. (*Laws 1845*, 73.)

By mechanic against owner to enforce lien. (*Laws 1830*, p. 412.)

Against owner of a carriage for negligence of driver. (1 R. S. 696, sec. 6; *Wright v. Wilcox*, 19 Wend. 343.)

Against heirs jointly for debts of testator. (*Laws 1837*, 537, sec. 73.)

By assignee of bond of deceased person leaving no executor, in his own name. (2 R. S. 2d ed. 274, sec. 6.)

By assignee of bond to sheriff, in his own name. (2 R. S. 2d ed. 444, secs. 26, 27; *Id.* 354, secs. 58, 59.)

By purchaser of real estate sold on execution, against execution creditor. (2 R. S. 2d ed. 298, sec. 72.)

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Fifth. Were the words of the 31st section in question, or rather the word "cause" in that section contained to receive the broadest possible construction, uncontrolled by the context or the subject matter of the article, to wit, "penalties and forfeitures"—and were it to be admitted that by this section all actions founded on statutes are barred in three years—yet it would not affect this case, because,

This action cannot be said to be founded on a statute. It can only be said that the legislature *have refused to deprive us of our common law remedy against the members of this company as partners*, and have left that remedy entire. We have been preserved the right of suing for this debt *the parties who contracted it*—that is all. (*McCullough's Com. Dict.*, Title "*Companies*;" *Wordsworth on Joint Stock Companies*, 2-5; *Moss v. Oakley*, 2 *Hill*, 268, 269, 270; *Van Hook v. Whitlock*, 26 *Wend.* 51, 52; *Penniman v. Briggs*, *Hopk. Ch. R.* 300, 304; *Ex parte Van Riper*, 20 *Wend.* 616; *Collyer on Partnership*, 626; *Slee v. Bloom*, 19 *Johns.* 473, 474; *Harger v. McCullough*, 2 *Denio*, 123; *Bailey v. Bancker*, 3 *Hill*, 190.)

Sixth. The judgment of the court below should be reversed with costs, with judgment for the plaintiffs on the demurrer.

GEO. BOWMAN, *of Counsel.*

J. C. Smith, Attorney and Counsel, and
John Van Buren, Counsel for defendant in error.

First. All actions upon any statute, for any cause, the benefit and suit whereof is limited to the party aggrieved, should be commenced within three years after the cause of action accrued. (10 *Pick.* 123, 371-2; 2 *R. S.* 225, § 31, *new edition*; 1 *Rev. Laws*, 186, § 6.)


Second. This action is brought upon the statute incorporating the Rossie Galena Company. (*Sess. Laws*, 1837, 445; *Bullard v. Bell*, 1 *Mason's Rep.* 243; *Heacock v. Sherman*, 14 *Wend.* 58.)

Third. This action was not commenced within three years after the cause of action accrued. Therefore the plea of the statute of limitations of three years is good, and affords a bar to the recovery of the plaintiffs in this action. (*Van Hook v.*

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Whitlock, 2 *Edw.* 304; *same case*, 7 *Paige*, 373; *same again*, 26 *Wend.* 43.)

JESSE C. SMITH, *Attorney, and of Counsel.*


 Treated as *sureties*, not partners, (5 *H.* 131.) Reversed last fall—but the opinions speak of them as sureties of the company, (6 *Wend.* 357.) OLIVER, Senator, (15 *Wend.* 249; 13 *Pick.* 484; 24 *Wend.* 473; *Wordsworth Joint Stock*, appendix, 16.) Acts of parliament are not incorporated. Sue an officer—execution against all the stockholders—(on motion to court,—(*Burwell*—distinction between them and corporations)—*Angel and A. on Corp.* p. 2-5, 531, last ed.; 2 *Greenl.* 93, *Act of 88.*)

Section 13 is one in question—same as *R. S.* in substance—(*Hill*, read residue of same section—says *offence*)—taken from 31 *Eliz.* (*L.* 1825, p. 448, § 2, 3; 2 *R. S.* 397, § 44.)—Most of the difficulties put by the other side, are where it only goes to the *remedy*—*liability* existed *independent of statute*.—Not partners, for they are liable *severally* by statute, as well as jointly.

As to policy of the statute.—Eng. Joint Stock Act limits action, (P. W.) Mass. limits to one year after ceasing to be a member. (*Angel and A.* p. 549, 3d ed.)

Van Buren, *Attorney-General*, same side.

Action is founded on the statute: see declaration. *Moss v. McCullough*, in Court of Errors, PUTNAM, Sen. (5 *Conn.* 28; 3 *Conn.* 54; 8 *Mass.* 472; 17 *Mass.* 64, 330; 10 *Conn.* 409; *Laws*, 1818, ch. 183; *L.* 1821-1826, ch. 137; blank *Pick.* 123; 5 *Hill*, 134-136.) Judgment against corporation is evidence—evidence against the stockholder.

Not partner, 3 *Hill.* 

DECISION. Judgment of the supreme court reversed, and judgment for plaintiffs on demurrer.

JONES, J. delivered the opinion of the court, in which BRONSON, J. concurred in a short opinion. JEWETT, Ch. J., dissented.

NOTE. The court decided that the suit was not an action upon a statute for a forfeiture or cause, the benefit and suit whereof is limited to the party aggrieved,

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therefore not barred by the short statute (*three* years) of limitation: that *six* years' statute of limitations applied in such suits.

The court *held*, that the stockholder was originally and primarily liable, like partners or members of an unincorporated association. His liability was not created by statute.

Reported, 1 Comstock, 47.

CURTIS, plaintiff in error, *agt.* JONES, defendant in error.

Questions discussed.

The defendant, in an action of replevin, *avowed* the detention of the property, (sash doors,) under his right of lien for the manufacture thereof. The plaintiff pleaded to the avowry, that the work was done under, and in pursuance of an agreement theretofore made between the parties, whereby it was, among other things, agreed that the defendant should manufacture the doors for a certain price, specified in the agreement, a part thereof to be paid to the defendant as the work progressed, and the remaining part to be paid after the doors should be completed and hung. And an allegation, that at the time of the detention, the plaintiff had paid the defendant all that had then become due to him.

1. Whether the plea to the avowry was sufficient, in not setting forth with reasonable certainty the terms, and showing what the particulars of the agreement were under which the doors were made, including, as most essential, the price and time of payment?

2. Whether the plea contained in substance a bar to the lien set up by the defendant; and not having been demurred to upon the ground that the *price and time of payment* were not stated; the ground on which the supreme court decided the cause and reversed the judgment, was in that respect to be considered as upon a *general demurrer*?

3. Whether, where the jury having passed upon the question of fact, and found the doors the property of the plaintiff, it did not involve all the matters in the demurrer, and contain all the merits, so that judgment should have been for the plaintiff upon the whole record?

Curtis brought replevin in the *detinet* in the court of common pleas of Monroe County against Jones for eleven double sash doors. Jones pleaded, 1st. Non detinet. 2d. Property in himself. 3d. Property in Horatio N. Curtis. 4th. The defendant avowed the detention of the goods, alleging that he

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was a carpenter and joiner, and, as such, was employed by the plaintiff to manufacture, and did actually manufacture, the doors in the declaration mentioned, for the plaintiff, from materials furnished by the plaintiff, and at the time when, &c., the plaintiff was and still is largely indebted to him, the defendant, for the work and labor of the defendant, his servants and agents, bestowed in and about the manufacture of said doors for the plaintiff, and at his request, to wit; in the sum of \$200. And that the defendant, by virtue of his lien upon said doors, as the manufacturer thereof at the time when, &c., did detain the same as security for the payment of said sum, so due to him; concluding with a verification, prayer for judgment, and a return of the doors.

The plaintiff replied to the 1st, 2d, and 3d pleas, taking issue upon them. To the avowry, the plaintiff pleaded that the defendant ought not to avow the detention of the doors, &c., because, he says, the doors were manufactured by Jones for him, the said Curtis, under, and in pursuance of an agreement theretofore made and entered into by and between them, whereby it was, among other things, agreed that Jones should and would manufacture the doors for Curtis, at, and for a certain price specified in the agreement, a part thereof to be paid to Jones, as the work progressed, and the remaining part thereof to be paid after the said doors should be completed and hung; averring that at the time of the detention of the doors he had paid Jones all that had then become due to him on account of work done by him on the doors; concluding with a verification and prayer for judgment, &c.

To this plea Jones demurred; and assigned the following special causes:—

1. That it alleged facts inconsistent with the facts stated in the avowry; that at the time when, &c., the plaintiff was, and still is, largely indebted to the defendant for work and labor bestowed in the manufacture of said doors, but does not traverse that part as he should have done.

2. That the plaintiff does not state in said plea what part of the price for the manufacture of said doors was to be paid as the work progressed, and what part was to be paid after the doors should be completed and hung.

3. That the plaintiff does not show at what time the doors were to be completed and hung, or that he had any right to take them out of the defendant's custody until the time had expired.

4. That the plaintiff does not show that the defendant unreasonably delayed the completing and hanging of said doors.

5. That the plaintiff does not show that the doors were completed, &c.

The plaintiff joined in demurrer. The common pleas gave judgment on the demurrer in favor of the plaintiff. At the same time the issues of fact were tried by a jury, and a verdict upon each was found for the plaintiff.

The jury assessed the damages of the plaintiff for detention at six cents, and the value of his property at \$275. Upon which that court rendered a judgment that the plaintiff, Curtis, recover against the defendant, Jones, said damages, and also \$60,51 for his costs.

The supreme court, BEARDSLEY, J., delivering the opinion, reversed the judgment of the common pleas, and adjudged that Jones should be restored to all things which he had lost by occasion thereof, on the ground that the plaintiff's plea to the avowry was general, vague and uncertain; that it should have shown what were the particulars of the agreement under which the doors were made—including, as most essential and indispensable, the *price* and *time of payment*.

Reported 3 Denio, 590.

The judgment record of reversal, as entered up in the supreme court, recited as follows: "And it is further considered, the said defendant now here waiving a return of the goods and chattels above-mentioned, that the said Justus B. Jones recover against the said Abijah B. Curtis \$275, the value of the said goods and chattels by the jurors aforesaid found, and likewise, \$125,27 for his costs and charges, &c."

H. Humphrey Attorney, and

M. T. Reynolds, Counsel for plaintiff in error.

First. The plea to the avowry contains in substance a perfect bar to the lien set up by the defendant; and not having

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been demurred to upon the ground that the price and time of payment were not stated, the ground on which the supreme court decided the cause, is in that respect to be considered as upon a general demurrer, and so is good.

That such plea may be pleaded to an avowry. (*Jones on Bailment*, *Phil. ed.* 1836, *Appendix* 49-52; 4 *M. and S.* 180, *Chase v. Westmore*; 18 *John.* 157, *Chandler v. Belden*; *Cross Law of Lien*, 42-327.)

That the plea is good. (*Com.-Dig. Pleader E.* 5; *C.* 22; 13 *East*, 102, *Andrews v. Whitehead*; 2 *B. and P.* 265, *Ward v. Harris*; *Cro. Eliz.* 916, *Braban v. Bacon*; *Sheen v. Farrington*, *B. and P.* 1, 640; *Barton v. Webb*, 8 *J. R.* 459; *Clarke v. Gray*, 6 *East*, 567.)

1. The rule in a plea is less strict than in declaration, requiring less certainty. (1 *Saund. Rep.* 49, *n.* 1; *Com. Dig. C.* 17 *Pleader.*)

2. The statement of the contract being mere inducement, still less certainty was necessary. (*Archbold's Pleadings*, 237; *Co. Lit.* 303, *a*; *Plowd.* 431, *a*; *Com. Dig. Pleader, E.* 10.)

3. It was not necessary to state the price of the doors, as no damages dependent upon that price were claimed. (13 *East*, 102.)

4. The plea is analogous to a declaration against a common carrier, where the averment always is, that the goods were to be carried for a certain reasonable reward. (*See Precedent*, 2 *Chit. Plead.*; 6 *East*, 567; 13 *East*, 114.)

5. The court could not have determined whether the defendant had a lien upon the doors from the particulars of the contract, any better than they can now do; as that depends upon the fact, whether what was due upon the doors has been paid, and not upon how much has been paid.

6. The objection to the plea is, that it does not state what part of the price was to be paid. Now what part means, what proportion, taking the whole as a unity; so that the complaint is that we have not stated, whether one-half, one-third, or one-quarter, &c., was to be paid—not that we do not state the price: as to this the demurrer is general.

7. The time of payment is stated to be as the work pro-

gresses ; and after the doors were hung ; that is, immediately after.

8. To an avowry for rent in arrear, the plea of *riens in arriere* is good. This plea is substantially like it ; although that form could not have been safely adopted, as money is, in common parlance, said to be due, though payable at a future day.

9. The indebtedness was not an issuable fact, being a mere inference of law from the defendant's manufacturing the doors at the plaintiff's request. The avowry was in the form of the common counts in assumpsit, to which "*nil debet*" cannot be pleaded.

10. To state what part of the price, was useless and unnecessary, as shown above.

11. These matters are not set up as a ground of detention. The whole duty of a pleading is to answer the previous pleading, which this does.

12. But the avowry is bad in substance. An avowry is applicable and permitted only in case of a distress ; in other cases, the party should plead, and not avow. The very definition of the word shows this. (*Jacob's Law Dict., avowry ; Ley. 70 ; 2 Lill. 454 ; 3 R. S. p. 529, §§ 41, 42, 1st ed.*)

No precedent for such an avowry can be found.

13. Replevin in the detinet is substituted for the old action of detinue. (1 *Chitty's Plead.* 117, 157-8 ; 2 *R. S. p. 522, Replevin.*) -

In detinue the party could not avow, but must plead. (1 *Chit.* 484 ; 2 *Chit. precedents*, 1023, 1025.)

14. The distinction between an avowry and plea is important, because a party may plead to an avowry as many matters as he may see fit. (2 *R. S. 529, § 45, 1 ed.*)

15. The answer to an avowry is by plea—to a plea by replication, and many of the rules applicable to a plea, differ from those applicable to a replication.

16. If a party may avow here, why not in trespass ? In trespass, a public officer may by statute. (1 *Ed. R. S. 353, sec. 16.*)

17. It is an avowry at common law ; the statute allowing a

general avowry does not apply to it. (2 R. S. 353, § 16; 2 R. S. 529, § 45.)

It is, therefore, to be considered by the rules of the common law, where title must be deduced with great particularity. (*Shepard v. Boyce*, 2 J. R. 446; 3 B. and P. 348; 6 East, 434; 5 T. R. 248; 5 Wend. Rep. 663; 1 Saund. Rep. 347, n. s.; *Yelverton*, 148; 2 Saund. 312, a; 4 Taunt. Rep. 319, a, *Brown v. Sayer*; 1 Chit. Plead. 491.)

18. It was necessary to set out the special contract, which is not done, as the averment that he was employed is not equivalent. (1 Chit. Plead. 337; 1 Saund. Rep. 264, n. 1; 2 East, Rep. 506; 2 Stra. 933.)

19. The judgment ought to have been for the plaintiff upon the whole record. All the matters involved in the demurrer are found for the plaintiff upon the issues of fact.

Property is found to be in the plaintiff and not in the defendant. This issue involves the question of lien attempted to be raised by the avowry. (12 Wend. Rep. 36, *Rogers v. Arnold*; 1 Caines' Rep. 218, *Halleck v. Howell*.)

20. The demurrer decides nothing as to the merits. All that the court pass upon is, that the contract ought to be more explicitly stated, while the issue of fact contains all the merits.

See *M. T. Reynolds*, in reply—2 R. S. 529, shows when avowry may be made, §§ 41, 42, 56, *sub.* 3, prayer of defendant, § 57—verdict for damage, where distress damage feasant.

Should limit statute in same way where a lien—extent of lien, §§ 40, 53, 54.

The defendant says plaintiff was “*largely indebted*,” namely, \$200.

Plaintiff “says he paid all that was due.”

That is a good answer to “*largely indebted*.” The “*to wit*, \$200,” amounts to nothing. If that is the amount of what is due, then the plea of payment “of all *that was due*,” is a sufficient denial.


2d. The statute shows that an avowry should be confined to rent, and it makes an equitable provision. (2 R. S. 619, § 56, *sub.* 3; *Vide also* § 51.) I insist, therefore, that the court

ought to confine an avowry to the case of rent, and the cases specified in the statute. (2 R. S. 353, § 16 ; 2 R. S. 529, §§ 41, 42, 38-40.) Silver cup case. This was a justification by an officer, and he is permitted to *avow* by statute.

3d. The record shows that defendant was not owner in any sense. The same evidence that would sustain the avowry would sustain the plea and defeat claim of title to the doors. The special property was enough to find this part in favor of defendant.

Where the same fact comes in issue, and is found by a jury on a proper issue, and admitted *presumptively* by an *imperfect answer*, how shall the court give judgment? The truth is found to be, that the defendant had *no lien*, and the admission grows out of a defective allegation on our part of the same fact. On this record how can the court give judgment against us?

We have a right to a return by § 55 of the statute. The exception is confined to *distress*.

This proves that the legislature never contemplated any avowry except in cases of distress and seizure by sheriff; in the latter case the money in the hands of the sheriff or officer is in custody of the law. 

H. R. Selden, Attorney and Counsel for defendant in error.

First. The plea of the plaintiff to the defendant's avowry is bad, because it does not set forth with reasonable certainty the terms of the agreement which it sets up. (*Com. Dig. Pleader, E. 5, C. 22; 13 East, 102, Andrews v. Whitehead; 2 Boss. & Pul. 265, Ward v. Harris.*)

"In general, whatever is alleged in pleading must be alleged with certainty." (*Stephen's on Pleading, 334.*)

And "the party who pleads a contract, *must set it out*, if he be a party to the contract." (*Stephen's on Pleading, 339.*)

Second. The plea does not show that the defendant had not the lien set up in his avowry.

It does not appear that defendant was to part with the possession of the doors when they were hung. They may have book-case, or other similar article to be hung in defendant's shop.


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The contrary would, perhaps, be inferred, *but the plaintiff has not shown it*, and therefore has not *answered* the avowry.

The lien of the artizan is just and equitable, and is favored in law—and it is not destroyed by a special agreement, unless the terms of the agreement are inconsistent with the lien. (2 *Kent's Com.* 634, 635.)

Third. The jury only passed upon the *issues of fact* submitted to them, and the defendant having interposed another complete defence to the suit, which has not been answered by the plaintiff, is entitled to judgment upon the whole record.

H. R. SELDEN, *Attorney for defendant in error.*


 Cases cited on the other side against them—*Com. Dig.*—Plea does not show that defendant in error was to part with possession—12 *W.* 35, and authorities there cited, to show, *should have traversed indebtedness*—may have an avowry in such a case—*Jac. L. Dic.* cited on the other side proves it. (3 *Lev.* 204.)

The precedents are avowry for *distress only*—but at an early day held replevin only, lay for distress—and that was the reason precedents of avowry are only for a distress—*Bull. N. P.* 55.—Avowry, where the *general right of property is in the plaintiff*, but defendant has *some lien or right to take it* notwithstanding plaintiff's general property—as for rent, lien, &c.

Here we show a lien and a right to hold plaintiff's property.—But at all events, it is *mere question of form*.—Substance is here—good justification.—They should have demurred specially.

Gilb. Replevin, 143.—Avowry when should make cog. mere form.

Not bound to the precise sum. (2 *R. S.* 353, § 16.)

(2 *R. S.* 531, § 55)—rent excepted—then to have rent in arrear—not before.—But that is not this case. 

JEWETT, Ch. J. By the avowry, the defendant justified the detention of the doors in question, on the ground that he had an existing right of lien upon them for the price or value of his work and labor bestowed as a carpenter and joiner in their manufacture at the plaintiff's request.

The rule is well established, that every bailee for hire, who, by his labor and skill, has imparted an additional value to the

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goods, has a lien upon the property for his reasonable charges, whether there be an agreement to pay a stipulated price, or only an implied contract to pay a reasonable price, unless there be a future time or mode of payment fixed; in such case the special agreement would be inconsistent with the right of lien, and would destroy it, (*Grinnell v. Cook*, 3 *Hill*, 485; *Blake v. Nicholson*, 3 *Maule and Selwyn*, 168; *Chace v. Westmore*, 5 *id.* 180; *Cramsbay v. Hornpay*, 4 *Barn. and Ald.* 50; *Burdick v. Murray*, 3 *Vermont R.* 302; 2 *Kent's Com.* 5 *ed.* 634.)

To avoid the bar interposed by the avowry, the plaintiff, by his plea, attempted to show that the defendant, at the time of the detention, had no lien upon the doors, on the ground that they had been manufactured under a special agreement calling for their completion and delivery prior to the time limited for the payment of a certain part of the price for manufacturing them, and that the remaining part of such price had been paid at the time of such detention. The avowry goes upon the ground, that the doors were manufactured upon an implied contract to pay a reasonable price for the work and labor expended. The plea, upon the ground that they were made under a special agreement, specifying the time when the doors were to be made and delivered, the price for making, and the times when the same was to be paid, and that some part thereof was not payable until a day subsequent to the completion and delivery of the doors, and that only that part of such price remained unpaid at the time of the detention.

This plea is objected to as insufficient, on the ground, among others, that it does not set out the terms of the contract, in words or according to its legal effect under which it is claimed the doors were manufactured.

It is a general principle, that whatever is alleged in pleading, must be alleged with reasonable certainty; and that he who pleads a contract must set it out, if he be a party to it. The particulars of the agreement should have been stated, so that the court could determine whether the right of lien existed at the time of the detention, and in order to apprise the defendant of what was meant to be proved in order to give him an opportunity to answer or traverse it. (1 *Chit. Pl.* 216.) I

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agree with the court below, that this plea is too general, vague, and uncertain—and is therefore bad.

The judgment of the common pleas was properly reversed, on the ground that the plea to the avowry was bad; and judgment was correctly given for the defendant upon the whole record, notwithstanding the jury had found the issues upon the first, second, and third pleas of the defendant in favor of the plaintiff. The rule is well settled, that where there is one good count in a declaration, if sustained by evidence, it entitles the plaintiff to recover upon the whole record, though there may be several others which are bad or found against him, if the judgment is confined to such good count. So if one of several pleas of a defendant which goes to the whole cause of action is sustained, it constitutes a bar to the recovery of the plaintiff. (*Jack v. Martin*, 12 *Wend.* 311; *S. C. in error*, 14 *Wend.* 507; *Cook v. Sayre*, 2 *Burr. Rep.* 755; *Luw v. King*, 1 *Saund Rep.* 76, *N.* 1, p. 80.)

The case of *Cook v. Sayre* was an action for trespass and assault for criminal conversation with the plaintiff's wife; the defendant pleaded 1, not guilty, and 2, not guilty within six years, and there was an issue on the first plea and a demurrer to the other. The issue on the plea of not guilty was tried first, and found for the plaintiff, with fifty pounds damages. Afterward, the demurrer was argued and overruled, and determined for the defendant; although the issue on the plea of not guilty, was found for the plaintiff. It was held, he could not have damages upon it, because, *upon the whole*, judgment must be against him.

Now in the case at bar, although the issue upon the demurrer was disposed of by the court in favor of the plaintiff, before the issues of fact were tried, yet, the supreme court having determined the demurrer in favor of the defendant, it appeared that the plaintiff *upon the whole* had no cause of action, and judgment was given against him, upon the whole record. That entitled the defendant to a return of the property, or if he elected so to have it, the value instead of a return, and to costs, except the costs arising from the trial of the issues of fact, to which neither party is entitled. (2 *R. S.* 617, § 27.)

But the judgment of the supreme court, as perfected, as appears by the record, is in part erroneous. The defendant was not entitled to recover the value of the property assessed by the jury on the trial of the issues. That was assessed under the provisions of 2 R. S. 530, § 48. So much of the judgment, therefore, as adjudges that the defendant recover against the plaintiff \$275, the value of the said goods and chattels by the jurors aforesaid found, must be reversed, and the residue of said judgment must be affirmed; and a further judgment must be rendered that the defendant have a return of the goods and chattels replevied, unless he shall elect to waive such return, and that he recover the damages sustained by him, by reason of the detention of such goods and chattels; and in case said defendant shall elect to take judgment for the value of the said goods and chattels instead of a return thereof, such value be assessed by a writ of inquiry to be issued out of the supreme court. (2 R. S. 531, §§ 53, 54, 55.)

The judgment of the supreme court being reversed in part and affirmed in part, this court has a discretion in awarding costs. (2 R. S. 618, § 31.) And I think, to deny costs to either party as against the other in this case, would be a proper exercise of such discretion.

BRONSON, J. The plea in bar to the avowry is bad, for the reasons assigned by the supreme court. It is also bad on another ground. The avowry alleges, that at the time when, &c., the plaintiff was largely indebted to the defendant for his work and labor upon the doors. The plaintiff pleads matters which are inconsistent with this material allegation, without traversing it; which is not good pleading. (*Prosser v. Woodward*, 21 Wend. 205; *Rogers v. Arnold*, 12 *id.* 35.) In the way plaintiff has pleaded, the parties might never arrive at an issue containing a direct affirmative and negative allegation.

As the plea in bar to the avowry was bad, and the avowry contained a good answer to the action, it was a matter of no consequence what became of the other issues. When one good bar is found or adjudged in favor of the defendant, he is entitled to judgment on the whole record, although other issues may be found or adjudged against him. (*Jack v. Martin*, 12

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Wend. 311 ; *S. C. in error*, 14 *Wend.* 507 ; *Cooke v. Sayer*, 2 *Burr.* 753 ; 1 *Saund.* 80, note 1.)

When the supreme court reversed the judgment of the common pleas, it proceeded, according to the established practice in such cases, to give such judgment as the inferior court should have given ; and rendered judgment for the defendant on the demurrer. But the attention of the supreme court was not called to the question how the judgment should be entered of record ; nor to the consequences which would result from it. The attorney, in making up the record, has entered the judgment of reversal ; but has taken no notice of the judgment which was rendered on the demurrer. And after the reversal, the attorney has proceeded to state in the record that the defendant waived a return of the goods ; and has then entered a judgment that the plaintiff recover the value of the goods, as the value had been assessed by the jury which tried the issues of fact.

There are two errors in the record as it has been made up. First, there is no judgment whatever upon the demurrer. When a court of review reverses a judgment, it gives such judgment as the court below should have rendered.

The second error consists in entering a judgment for the value of the property as it had been assessed by the jury which tried the issues of fact. As the action was in the common pleas, and the plaintiff recovered in that court, the only object of the inquiry concerning the value of the property was, to settle the plaintiff's right to costs. If the value of the property was less than fifty dollars, neither party would recover costs. (*Stat.* 1840, *p.* 333, § 19.) As the plaintiff recovered in the common pleas, no question could have arisen there about waiving a return, and taking judgment for the value of the property ; and the assessment of value by the jury could not have been made with a view to a recovery of the amount by the defendant. (2 *R. S.* 531, §§ 53-55.) When the supreme court rendered judgment on the demurrer, which, as the pleadings stood, entitled the defendant to a return of the property, he might have elected to waive the return, and take judgment for

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the value, to be assessed by a writ of inquiry, (§ 55.) But that is not the course which he pursued.

So much of the judgment of the supreme court as reverses the judgment of the common pleas, and gives costs to the defendant, should be affirmed; and the residue of the judgment of the supreme court should be reversed. Judgment should then be rendered for the defendant on the demurrer; and that he have a return of the property; or if he elects to waive a return, he will be entitled to a judgment for the value of the property, to be assessed on a writ of inquiry, which will issue out of the supreme court when the proceedings are remitted.

As the judgment of the supreme court is affirmed in part and reversed in part, costs are in the discretion of the court, (2 R. S. 618, § 31,) and no costs should be allowed to either party. Judgment accordingly.

Decision. “It is ordered and adjudged that so much of the judgment of the supreme court as reverses the judgment of the court of common pleas, and so much of the said judgment as awards costs to the said Justus B. Jones, be, and the same is, hereby *affirmed*, and that all the residue of the said judgment be, and the same is, hereby *reversed*. It is further ordered and adjudged, that the plea in bar of the said Abijah B. Curtis to the avowry of the said Justus B. Jones is not sufficient in law to bar or preclude the said Justus B. Jones from avowing the detention of the said goods and chattels, or from having a return thereof. It is further ordered and adjudged, that the said Justus B. Jones have a return of the said goods and chattels, or, if he shall elect to waive a return of the said goods and chattels, and take judgment for the value thereof, then, that he have judgment to recover the value of the said goods and chattels; and that such value be assessed by a writ of inquiry, which writ will issue out of the supreme court when the proceedings are remitted.” Neither party to recover costs against the other in this court.

NOTE. JEWETT, Ch. J., arrives at the following results: That every bailee for hire, who by his labor and skill has imparted an additional value to the goods, has a lien upon the property for his reasonable charges, whether there be an agreement to pay a stipulated price, or only an implied contract to pay a reasonable price, unless there be a future time or mode of payment fixed.

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Whatever is alleged in pleading, must be alleged with reasonable certainty and that he who pleads a contract must *set it out, if he be a party to it.* *Held*, that the plaintiff's plea to the avowry was bad, because the particulars of the agreement set up in it should have been stated, so that the court could determine whether the right of lien existed at the time of the detention, and also in order to apprise the defendant of what was meant to be proved, so that he might answer or traverse it.

If one of several pleas of a defendant, which goes to the whole cause of action, is sustained, it constitutes a bar to the recovery of the plaintiff, notwithstanding some other issues may have been found in favor of the plaintiff.

BRONSON, J. *Held*, that the avowry alleging that at the time when, &c., the plaintiff was largely indebted to the defendant for his work and labor upon the doors; and the plaintiff pleading matters inconsistent with this material allegation, without traversing it, was bad pleading.

The plea was also bad, for the reasons assigned by the supreme court.

Where one good bar is found or adjudged in favor of the defendant, it is a matter of no consequence what becomes of the other issues, he is entitled to judgment on the whole record.

JENCKS, plaintiff in error, *agt.* SMITH, defendant in error.

Questions discussed.

1. Whether *growing grass* upon land leased by a tenant of the owner, can be mortgaged by the tenant in possession, as *personal property*? In other words, is it real or personal property, and would it go to the *executor*, or the *heir*?

2. Whether it is necessary, in order to sustain a judgment under a chattel mortgage, to show that proof was given on the trial, of the *residence* of the *mortgagor*, or that the property mortgaged *was in the town* at the time the mortgage was executed? (*Laws* 1833, *chap.* 279, *p.* 402.) And where such proof does not affirmatively appear, and no objection being made on that ground at the trial, can advantage be taken of it afterward, although the proof would be held necessary, if proper objection made?

Israel Smith sued Elmer D. Jencks before a justice of the peace in Madison County, in an action of trespass for taking and carrying away a quantity of hay claimed by the plaintiff. The defendant pleaded the general issue, and gave notice that he would prove that the hay belonged to him by virtue of a chattel mortgage given by Philip Arnold, the owner of the hay.

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On the trial, (which was by a jury,) the plaintiff proved the rendition of a judgment in his favor, against Philip Arnold, on the 10th of January, 1843, by a justice of the peace. Also the issuing of an execution upon that judgment and several renewals of it. Also proved the levy upon the hay in question, and the sale of it, about the last of September, 1843. The hay, when sold, was in stacks on the premises in possession of Arnold. Arnold informed the constable, after the levy, and in the presence of one Miner, the agent of plaintiff, that he had given Jencks a mortgage on the grass while it was growing. Plaintiff proved that the hay was drawn away by Jencks' direction about the 1st October, 1843, and used by him.

The defendant proved, by Philip Arnold, that the grass was mortgaged by Arnold to the defendant for a book account he owed him. Defendant hired Arnold to cut the grass, and paid him. The mortgage was introduced, and the execution of it admitted by plaintiff's counsel, and read in evidence without objection. It was dated July 13, 1843, payable on the first of August following, for \$15,50. The witness said he saw the mortgage when it was filed by the town clerk of De Ruyter, when the filing bears date, on the day of its execution or date, and witness took it from the town clerk's office.

The jury found a verdict for the defendant, upon which judgment was rendered by the justice for \$5,00 costs. The plaintiff brought certiorari to the Madison common pleas, and that court affirmed the judgment of the justice. The plaintiff then brought writ of error to the supreme court, and that court reversed the judgment of the common pleas and justice, on the ground that there was no proof on the trial of the residence of the mortgagor, or that the property mortgaged was in that town at the time the mortgage was executed. JEWETT, J. delivered the opinion of the court. *Reported 1 Denio, 580.*

*A. Scott Sloan, Attorney, and
Henry G. Wheaton, Counsel for plaintiff in error.*

First. The grass mortgaged, was grown on lands owned by one Hunt, and held by the mortgagor as tenant. It would go to the executor, not to the heir, and in such case is personal

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property. (1 *Hill*, 176; see *opinion of Jewett, J. in this case in sup. ct.*; 1 *Cowen's Tr.* 272; 1 *Comyn on Contracts*, 75-80; 9 *C.* 39.)

Second. The proof showed, that the mortgage was given for a good consideration, and the jury having by their verdict negatived the presumption that it was made to defraud creditors, this court will not interfere. (*Smith & Hoe v. Acker*, 23 *Wend.* 652; *Fuller v. Acker*, 1 *Hill*, 473; 16 *Wend.* 529.)

Third. The return of the justice does not purport to state all the testimony given on the trial. (*See Error Book.*) This being so, the intendment is that there was sufficient to warrant the verdict. (2 *Cow. Tr.* 987, 988.) It will be presumed that proof was given that the mortgagor resided in the town where the mortgage was filed.

Fourth. In this case the defendant in error had actual notice of the existence of the mortgage. (*See Error Book.*)

Fifth. The judgment in the justices' court may be upheld on the ground that there was a sale and delivery of the hay, irrespective of the mortgage. (*See testimony of Philip Arnold, case, p. 7.*)

Sixth. The point now made, that it was not proved that the mortgagor resided in the town where the mortgage was filed, not having been raised on the trial, cannot now be insisted upon in this court. (*Jackson v. Christman*, 4 *Wend.* 277; *Jackson v. Davis*, 5 *Cowen*, 123; *Jackson v. Jackson*, 5 *Cowen*, 173.)

A. SCOTT SLOAN, *Attorney for Plff. in Error.*

H. G. WHEATON, *of Counsel.*

Calvin Carpenter, Attorney, and



Wm. J. Hough, Counsel for defendant in error.

First. The mortgage by which the defendant (in the justices' court) claimed the hay, was void so far as it professed to cover the grass from which the hay was made. Growing grass is a part of the realty, and is not the subject of being conveyed or pledged as security by chattel mortgage. The mortgage, therefore, gave the defendant no subsisting lien upon it; and when it was cut and made into hay, it was still the property of Arnold, the mortgagor, and being levied upon while in his pos-

session, the plaintiff acquired a good title to it by his purchase under the execution.

“*Grass growing*, fruit not gathered, or other articles which belong to the freehold and go to the heir, and which include all such things as are growing upon land, but which are *not raised annually* by labor and manurance, cannot be sold on execution,” for the reason that they are a part of the freehold, and consequently cannot be sold or pledged by chattel mortgage. (2 *Cowen’s Treatise*, 1049, *top* ; *Toller’s Law of Executions*, 114, 115 ; *Greene v. Armstrong*, 1 *D. R.* 550, and cases there cited ; 2 *R. S.* 24, § 6, *sub.* 6 ; 3 *R. S.* 639, *Revisers’ Notes*, “*original note.*”)

That Arnold’s title to the land on which the grass was growing, was by lease from Hunt, did not change the nature of the property, nor convert the growing grass (a part of the freehold) into personal chattels. It was a title *less* than a fee *simple*, yet it was nevertheless a *title*, a *fee*, during the time the lease had to run ; whether that was for one year or ten, does not appear, nor is it material ; the principle is the same. If the lessee had died, the *title*, the *fee* of the land, and consequently the growing grass for the remainder of the lease, would have gone to the *heir*, and not to the *executor*.

 Arnold, though tenant to Hunt, owned the land for the term, whether long or short. And so title to land and grass in the same person. So judge went on a mistaken assumption of fact. 

Second. “There was no proof on the trial of the residence of the mortgagor. Whether he resided in the town of De Ruyter,” where the mortgage was filed, “or even in this state, does not appear. Nor does it appear that the property mortgaged was in that town at the time the mortgage was executed,” nor does it appear that the mortgage was on file with the town clerk at the time the hay was levied upon by the execution. The mortgage was, therefore, fraudulent and void as against the execution creditor, the possession of the hay being in the mortgagor at the time of the levy.

The *statute of 1833, chap.* 279, *p.* 402, requires that every mortgage and conveyance intended to operate as a mortgage of

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goods and chattels, thereafter made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor and against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy, shall be filed in the town or city where the mortgagor, if a resident of this state, shall reside at the time of the execution thereof; and if not a resident, then in the city or town where the property so mortgaged shall be at the time of the execution thereof. (*Smith v. Jencks*, 1 D. R. 580; *Harford v. Artcher*, 4 Hill, 271; *Smith & Hoe v. Acker*, 23 Wend. 653.)

Third. The plaintiff in the justices' court acquired a valid title to the hay by the levy, sale, and purchase under his execution. The judgment of the supreme court reversing that of the common pleas, and also that of the justice, which was clearly unsupported by the evidence, was therefore clearly right, and should be affirmed with costs. (*Baldwin v. Delevan*, 2 Hill, 125, and cases there cited.)

Decision. Judgment of the supreme court reversed, and that of the common pleas affirmed.

WRIGHT, J., delivered the opinion of the court, in which BRONSON, (in a short opinion,) GARDNER, RUGGLES, and JONES, J. J., concurred.

JEWETT, Ch. J., and GRAY, J., delivered opinions for affirmance, with whom JOHNSON, J., concurred.

NOTE. The court held, that if the return of the justice showed affirmatively, that proof was wanting of the residence of the mortgagor, and that it did not appear that the mortgage was filed in the town where the property was, and that objection was raised before the justice, on account of the absence of it, the defect would be fatal.

But where the return is merely silent on the point, and no objection appears to have been taken before the justice, and where opportunity is given for objection, and the party whose duty it is to object remaining silent, all reasonable intendment will be made by this court to sustain the judgment.

Reported, 1 Comstock, 90.

Wood, executor *agt.* Weiant and others.

Wood, executor, &c., plaintiff in error, *agt.* WEIANT and others, defendants in error.

Questions discussed.

1. As to the true *location* (from the evidence) of the northerly boundary line of the Kempe tract of land, and the southerly boundary of the Wolf tract adjoining, situated in the town of Haverstraw, Rockland Co., adjoining the Hudson river.

2. A witness being offered on behalf of the plaintiff, and objected to on the ground of interest, and that interest being established by a witness sworn for that purpose, and the principal witness thereupon being released; whether the circuit judge properly allowed the defendants to impeach the *credibility* of the principal witness by an examination of him (cross-examination) upon the matters previously testified to by the witness called to prove his interest?

3. Whether a deed acknowledged before a commissioner of deeds, in his county, could be read in evidence, (under the *Laws of 1833, ch. 271, § 19,*) at the circuit in another county, without the certificate of the clerk of the former county, required by § 18 of the statute, (1 *R. S.* 749, § 18,) “of the proof and recording of deeds?”

The action was by Wood against Weiants, for cutting wood and timber between the lines marked on the map, P. E. and B. G., which the plaintiff claimed was a part of a tract of land called the *Wolf Tract*; he gave in evidence a patent dated Oct. 30th, 1749, to the children of Richard Bradley, for a certain tract, since known as the *Wolf Tract*, together with several other tracts; bounded and described as follows: “Beginning at the southeast corner of the aforesaid Bearhill tract, and on the west side of a small creek, which runs on the west side of a certain meadow called Salisbury’s meadow, and is esteemed by some persons to be a part of the manor of Cortlandt, and runs from thence along the line of the said Bearhill tract, north 62°, west 16 ch., then south 25°, west 79 ch., then south 50°, east 43 ch., then north 62°, east 86 ch. to Hudson’s river, then up along the said river to the meadow aforesaid, and then by the bounds thereof to the place where this fourth tract begun, containing 500 acres.” The plaintiff also gave in evidence a patent granted 18th March, 1769, to William Kempe and others, for a tract of 3,000 acres of land, particularly de-

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scribed. It is bounded on the northerly line by the Hudson's river, and then runs westerly along the river as it runs to the said tract of 500 acres, granted to the children of Richard Bradley, then along the bounds thereof, south 62°, west 86 ch., then north 50°, west 43 ch., to a tract of 500 acres granted to Thomas Ellison, and Lawrence Rooner. It does not appear from the case precisely at what time Joseph F. White became the owner of the easterly half of the Wolf Tract. Scofield, a witness, says it was about 1811. In August, 1813, Caldwell being the owner of that part of the Kempe Tract adjoining the Wolf Tract, sold and conveyed his land in the Kempe Tract to White, described thus: "Beginning on the line of the north bound of a tract of 1,000 acres granted to Bradley and Jamison, at a heap of stones, at the east point or corner of a part of the said Kempe Tract, lately set off and deeded to Samuel Brewster, (marked D on the map,) and running from thence along the line of Bradley and Jamison, north 45°, east 106 ch. to the Dunderburgh turnpike road, then westerly along the same as it runs 36 ch. and 75 links to the line of a tract now called the Wolf Tract, then along the same, south 62°, west 80 ch. to a heap of stones, then north 50°, west 43 ch. to a tract of 500 acres granted to Thomas Ellison, &c. In September, 1825, White's land was sold and conveyed by the sheriff of Rockland County, on judgments against him, to Joseph De Forest.

On the 14th of October, 1835, De Forest conveyed to Joseph Moser the same land, (in the Kempe Tract,) which he purchased of White, with the same boundaries and description contained in the deed from Caldwell to White. This deed was recorded 18th May, 1836. Moser conveyed the premises to the defendant with the same description. On the 31st of Oct., 1835, De Forest conveyed the Wolf Tract to the plaintiff, Wood. The deed was recorded 29th Dec., 1835.

The premises are described thus: "All that certain tract, piece, or parcel of land situated in the town of Haverstraw, in the county of Rockland, and state of New-York, being the easterly half of a certain tract of land of 500 acres, bounded southerly and easterly by the Hudson river, and the land form-

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erly purchased by Joseph F. White, of Joshua Caldwell, called the Kempe Tract, westerly by it, and part of the aforesaid 500 acres purchased by William Jaycocks, and northerly, by the land formerly, or now belonging to the heirs of Van Cortlandt, containing 250 acres, be the same more or less."

For the purpose of locating the lands purchased by the plaintiff of De Forest, or to ascertain the easterly and southerly line thereof, it was necessary to ascertain that line of the Wolf Tract, or the northerly line of the Kempe Tract; or the true lines of the land conveyed by Caldwell to White, which is the same thing, as that land was a part of the Kempe patent or tract, and run from point I at the Dunderburgh turnpike road on the map, westerly along the same, *as it runs 36 ch. and 75 links to the line of the Wolf Tract.*

This line, as claimed by the plaintiff, is indicated on the map by P. E. The line, as settled by the verdict of the jury, is indicated on the map by B. G. The line along the turnpike road, if extended the distance called for, would pass the line as claimed by the plaintiff to be the line of the Wolf Tract, more than twelve chains, and more than four chains from the line B. G.

Joseph P. Morgan was offered as a witness on the part of the plaintiff and objected to on the ground of interest. A witness, Lemuel June, was sworn to prove him interested, and his interest being established in the opinion of the circuit judge, it was supposed to be removed by a release, and he was sworn and testified. On his cross examination, the defendants' counsel proposed to examine him as to the same matters, but without specifying the particular facts he wished to elicit. The circuit judge permitted the examination for the purpose of impeaching his credit, but not as to his competency; that being established by the release. Plaintiff excepted.

The plaintiff offered in evidence a deed from Robert Lamoureux and wife, to Jacob Rose, dated May 26, 1836, and in due form of law acknowledged before a commissioner for, and in the county of Orange, on the 27th May, 1836. The counsel for the defendants objected, on the ground that the deed was

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not entitled to be recorded, for want of a certificate in due form of law of the clerk of the county of Orange. The counsel for the plaintiff insisted that the certificate of acknowledgment without any clerk's certificate was sufficient to entitle the deed to be read in evidence, under the statute of 1833. The circuit judge decided that the deed was inadmissible as evidence, without such clerk's certificate. The plaintiff excepted.

The plaintiff gave evidence, showing that one Parmenter run a line between the Wolf and Kempe tracts a few years before the trial, beginning at the Split rock on the Hudson river in the line P. E. marked on the map, and run on that line within a chain or a chain and a half of point P. and made a monument. The plaintiff's counsel then proposed to prove, (Parmenter being dead,) that Parmenter, when he made that monument or corner, *stated*, as a reason for not running quite to the *Harrow* monument, that there was so much dispute about the line that he would not run further, so as to be certain of being within bounds. This evidence was objected to, and rejected by the circuit judge. The plaintiff excepted. There were some other exceptions to evidence taken by the plaintiff, which will appear in the opinion of Judge JEWETT.

The circuit judge, Hon. CHARLES H. RUGGLES, in his charge to the jury, after adverting to the facts of the case applicable to this question, laid down the following principles: "That courses and distances given in deeds must yield to certain fixed and known monuments—that where the boundaries or division lines between the land of different owners have been located by fencing or other visible and certain marks, clearly intending to designate such lines, and acquiesced in for twenty years, such location would be conclusive upon the parties; but such was not the case between these parties; the premises in question are wild, mountain, unenclosed and uncultivated lands, and the parties have resorted to the declarations of former owners as to the boundaries, which, although admissible evidence against those who claim under them, are often unsatisfactory; they may sometimes be founded in mistake, and if the mistake be apparent, the parties are not bound, that there is more or less

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danger in trusting to these declarations, because they are liable to be misunderstood and misrepresented ; they should be clearly proved and established before they are entitled to a controlling influence with a jury."

The circuit judge then stated to the jury, in substance, that the evidence, excepting that which arose out of the deeds, seemed to favor the location as claimed by the plaintiff, but that the deeds afforded strong evidence against the plaintiff and in favor of the defendants.

After the charge of the circuit judge, the plaintiff's counsel excepted as follows : " And the counsel for the plaintiff then and there duly excepted to the said charge and each and every part thereof."

The jury found the defendants not guilty of the trespasses, &c. And judgment was entered for the defendants.

A bill of exceptions was made by the plaintiff, and argued before the circuit judge for a new trial, which was denied, and a written opinion given.

The plaintiff then carried the case to the supreme court, where the motion for a new trial on the bill of exceptions was argued and denied.

BRONSON, Justice, delivered the following opinion : " If there had been a known and acknowledged ground line between the Wolf and Kempe Tracts, that would have controlled the chaining along the Dunderburgh turnpike. But I do not see that there was any such line between the two tracts ; and it is doubtful upon the evidence where the line should run. De Forest was the owner of both tracts at the time he conveyed to Moser, under whom the defendant claims ; in such a case, there is nothing to control the length of line given in the deed. On this and the other questions made by the plaintiff, we are satisfied with the opinion of the circuit judge, a copy of which has been laid before us ; and this renders it unnecessary to discuss the question more at large."

The plaintiff brought a writ of error, and came to this court.

H. S. Dodge, Attorney and Counsel for plaintiff in error.

The supreme court erred in not awarding a new trial upon

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the bill of exceptions, as well upon the exceptions to the charge of the circuit judge, as to his decisions upon the admission and rejection of evidence.

First. The judge's charge was erroneous, and he ought instead to have charged the jury in the words of the opinion of the supreme court, (p. 84,) That "if there was a known and acknowledged ground line between the Wolf and Kempe Tracts, that would control the chaining along the Dunderburgh Turnpike," and the deeds would not estop or prejudice the plaintiff; and that if they were of his opinion that the weight of the evidence independent of the deeds was in favor of the plaintiff's location, then that the plaintiff was entitled to recover.

Second. The instructions to the jury as to the construction and effect of the deeds, (p. 69, *fol.* 269-274,) are entirely erroneous as well in their assumptions of fact as in point of law.

1. As to the facts. The deed from De Forest to plaintiff was recorded December 29th, 1835, (p. 11, *fol.* 30,) while the deed to Moser, under which defendants claim, was not recorded until May 18, 1836, five months later, (p. 21, *fol.* 72.) The plaintiff's title is therefore *prior*.

2. The chaining in De Forest's deed to Moser and in Caldwell's deed to White, does not coincide *substantially*, (*Charge*, *fol.* 270,) nor *exactly*, (*ib.*, *fol.* 273, 4,) with the Gurnee and Parmenter line B. G. On the contrary, defendants' own surveyors never so pretended, but prove that the 36 ch. 75 links along the turnpike, strikes K at the foot of the green line, (p. 33, *fol.* 114, also, *fol.* 128, 129, 144, 146,) although no allowances were made, (*fol.* 135.) Abraham Gurnee, one of defendants' surveyors, ran the 36.75 chains far beyond the green line, (p. 43, *fol.* 162-165.)

The green line is four chains from B. G. and twelve chains from P. E. (*V. Gurnee's testimony*, p. 35, *fol.* 124, 125, and *fol.* 130, 146, and the map which was made by him, page 34.)

3. The circuit judge acknowledges these errors in his opinion on the motion for a new trial before him, (pp. 80, 81.) His answer, (p. 80,) does not meet the objections: because, First, the question being one of title, the plaintiff's elder title cannot be harmed by the subsequent grant to Moser, and De For-

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est's acts after the recording of the grant to the plaintiff are not the acts of plaintiff's predecessor; and, secondly, plaintiff's deed does not refer to Caldwell's deed to White, but merely to the fact of the purchase. (*V. Van Wyck v. Wright*, 18 *Wend.* p. 165.)

And the evidence also shows that the circuit judge is entirely wrong in assuming, (p. 76,) that White owned the Wolf Tract when he bought of Caldwell. (*V. fol.* 31, 174, 218, 225, 236, 239, 240, 241.)

4. The Ellison corner was a point undisputed and agreed on by both parties. It was also proved beyond question by the witness who saw it made, (p. 52, *fol.* 200.) The two courses and distances from this corner to the turnpike are the same in both plaintiff and defendants' deeds. And the defendants' own evidence, (*see sub. 2 of this point*,) admits that it is impossible to get to the Ellison corner with those courses and distances without shortening the 36.75 chains along the turnpike at least four chains. So that the circuit judge is entirely wrong in supposing (*Charge, fol.* 273, *Opinion*, p. 79,) that there is no evidence of mistake in that distance, or that it furnishes strong or any evidence of the true position of the line.

5. The circuit judge also erred in charging, in substance, (*pp.* 68, 69, *fol.* 267,) that there was no evidence of fixed and known monuments to control the distance given in the deed, and that the parol evidence was of declarations to show an actual location for more than twenty years, and was to be distrusted. And he repeats this error in his opinion, (*pp.* 77, 78.)

The defendants' deeds not only call for "the line of the Wolf Tract," at the end of the 36.75 chains along the turnpike, but then proceed "along that line" in the exact course of the original Wolf patent, "to a heap of stones," then to the "Ellison Tract;" thus calling for three monuments: 1. "The line of the Wolf Tract;" 2. The heap of stones in that line at the corner; 3. The Ellison corner.

The plaintiff's evidence was directed entirely to showing where *those monuments in fact were*, and not at all to proving a practical location differing from the deed.

That the "line of the Wolf Tract" is a fixed monument

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within the rule, so as to control the chaining, even though the land be wood and wild, and means the line actually marked and run; and that if its situation be disputed, or the trees or other monuments are gone, it must be submitted to the jury on the evidence to find where it was at the date of the deed, and when found by them, will control the chaining as if the monuments still existed, or there was no dispute as to their situation, is established in the following cases. (*Pernam v. Weed*, 6 *Mass. R.* 131; *Jackson v. Camp*, 1 *Cowen*, 612; *Doel v. Thompson*, 5 *Cowen*, 378; *Jackson v. Widger*, 7 *Cowen*, 724; *Jackson v. Britton*, 4 *Wend.* 507; *Wendell v. The People*, 8 *Wend.* 183, in this court; *vide S. C. below*, 5 *Wend.* 146; *Rich v. Rich*, 16 *Wend.* 643; *Van Wyck v. Wright*, 18 *Wend.* 157, in this court; *Clark v. Wethey*, 19 *Wend.* 320; *Barclay v. Howell's Lessee*, 6 *Peters*, 499; 2 *Cowen and Hill's Notes*, 1378-9, 1400. *Opinion of the Supreme Court*, p. 84; 4 *P.* 209; 2 *Story's R.* 278; 5 *H. and John.* 163; 13 *Pick.* 145; 5 *Metc.* 223.)

That the fact of the chaining being at least four chains too much, is of itself sufficient evidence of a mistake to call for its rejection altogether. (*Vide Jackson v. Carey*, 2 *J. C.* 350.)

Third. The plaintiff at the trial furnished evidence, certainly sufficient to be left to the jury, to prove,—First, that the line E. P. was the “line of the Wolf Tract,” mentioned in the deed from Caldwell to White; second, that at the corner P, was the “heap of stones” mentioned in the deed; third, that the 43 chain line from the Ellison corner, when properly run, reached beyond the point B, and to the corner P, and the circuit judge ought to have instructed the jury that, if they found for the plaintiff on these points, he was entitled to recover.

The supreme court, in their opinion, (*p.* 84,) usurp the province of the jury in assuming against the plaintiff on the facts, especially as the circuit judge admitted the weight of evidence to be with the plaintiff. (*Charge, fol.* 269.)

Fourth. The circuit judge erred in allowing the defendants to attack the credibility of the witness Morgan, by examining him as to the same matters previously testified to by the witness, Lemuel June, (*pp.* 15, 17, *fol.* 49, 50.)

They were concluded by their resort to proof aliunde, and

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the examination allowed went merely to show interest after it had been released. (*Chance v. Hine*, 6 Conn. R. 231; 1 Cowen & Hill's Notes, p. 259; 1 Chit. R. 372, and note a; *Butler v. Butler*, 3 Day, 214; *Stebbins v. Sacket*, 5 Conn. 258.)

Fifth. The deed offered by the plaintiff, (p. 47, fol. 175-177,) was improperly excluded; it was admissible under the act of 1833, ch. 271. (2 R. S. 325, § 74, 2d ed.)

Sixth. The evidence offered by the plaintiff at p. 53, fol. 202, was improperly excluded. It was an offer to prove a *general reputation* as to boundary, and not a *particular fact* merely, and therefore admissible. (*Ellicott v. Pearl*, 10 Peters, p. 436; *Boardman v. Reed's Lessee*, 6 Peters, 328; *Conn. v. Penn.* 1 Peters' C. C. R. 496; 1 Bing. N. C. 430.)

Seventh. The evidence offered by the plaintiff at p. 56, fol. 214, was improperly excluded. And vide as to this witness, (p. 60, fol. 231, 232.) The hearsay offered was not only of the survey, but *generally of the line and monuments*. (*Vide in addition to the above cases*, 1 Cowen & Hill's Notes, pp. 634-6, and the cases there cited; 12 Pick. 532; 5 Metc. 223.)

Eighth. The evidence offered by the plaintiff at p. 56, fol. 215, of Col. Marvin's declarations after the survey, was improperly excluded, as well for the reasons stated on the preceding points, as on the ground that he was agent to both parties in making the survey, (pp. 29, 30.) (*Mott v. Kip*, 10 J. R. 478; *McCormick v. Barnum*, 10 Wend. 104.)

Ninth. The evidence offered by the plaintiff at p. 64, fols. 244, 248, was improperly excluded. It was a part of the *res gestæ*, an important part of the surveyor's act, and necessary to be shown in order to rebut the inference that might be drawn from his act of stopping, if left unexplained. (*Barclay v. Howell's Lessee*, 6 Peters, 504; *United States v. Brig Burdett*, 9 Peters, 689; *Westcott v. Bradford*, 4 Wash. C. C. R. 500; *United States v. Craig*, 4 Wash. C. C. R. 729; *Walters v. Lewis*, 7 Car. & P. 344; *Crane v. Nicoll*, 1 Bing. N. C. 430; 1 Cowen & Hill's Notes, 592, *et seq.*; *Burnet v. Burch*, 1 Denio, 141; *Rice v. Churchill*, 2 Denio, 145; 4 C. 423.)

The judgment of the supreme court ought to be reversed, and a *venire de novo* awarded.

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☞ If reverse, reverse absolutely—not *venire de novo*—plaintiff died after verdict, and before judgment, (*fol.* 281,) and costs will follow. (17 *W.* 208.) ☞

H. S. DODGE, *Attorney, and of Counsel for plaintiff.*

☞ (REPLY.) County clerk has no authority to certify except where to be recorded—[may certify *all* acknowledged deeds—clerk don't inquire whether party is going to have it recorded, or not.] ☞

Wm. Nelson, Attorney, and
A. Taber, Counsel for defendants in error.

The sole question in this cause on the trial was one, not of title, but of *boundary*. It was a controversy as to the true *location* of the northerly boundary of the Kempe tract, which was the southerly boundary of the Wolf tract; the plaintiff claiming to own in the latter, and one of the defendants in the former contiguous portions of land. The patent for the Wolf tract was granted in 1749, and that for the Kempe tract in 1769; but neither patent refers to any tangible or visible monument or boundary which affords any clue to the disputed line, and neither the plaintiff nor defendants connect themselves with either patent, but rely upon titles long subsequent, originally acquired probably from squatters. The plaintiff's title deeds bound him, (upon the disputed line,) *on the Kempe tract*, (*fol.* 31,) without giving any visible boundary. The defendants' title, which is the older one, from a common source, (*fol.* 67, &c.) gives a visible and acknowledged starting point, bounds the land on one of its lines on the *Dunderburgh Turnpike*, and from thence gives courses and distances, which correspond with the green line as the one in dispute; all the *distances* in defendants' deed being *accurate and consistent*, and all the *courses* being also consistent, *except that upon the westerly end of the green line*, which requires a variance of 7° degrees to clear; but which runs over a portion of the mountain, where, from metallic or some other attraction, the *needle varies some 15 or 20 degrees*. (See *fol.* 115, 141, 164, 180, &c.) And from the evidence afforded by the face of these deeds, the surveys, and

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a mass of oral testimony relating to monuments and marked trees, and the previous amicable settlement of this boundary line between the respective occupants of the lots, the jury have found the line in question as claimed by the defendants. And their *finding upon this disputed question of fact*, we trust will neither be disturbed nor reviewed by this court. We submit:—

First. That there is no ground for reversing the judgment in this cause arising from the decisions of the circuit judge in admitting or rejecting evidence on the trial.

The exceptions of plaintiff's counsel at fol. 49, 73, (*see fol.* 89,) 78, 177, 203, 214, 215, 248, are sufficiently answered by the opinion of the circuit judge at pages 81–84. (*L.* 1833, p. 390; 1 *C. & H.* 631, 724, 729.)

Second. The correctness or incorrectness of these decisions of the circuit judge is rendered immaterial, by reason of the plaintiff being *estopped from denying that the green line is the true division line* upon the *locus in quo*.

1. *By the deeds* under which the defendant claims from a common source of title and prior in date to that under which the plaintiff claims; the defendants' deeds giving a *visible and admitted starting point*, referring to the *Dunderburgh Turnpike*, a known location, and thence giving *courses and distances which correspond with the green line on the map*; and by the plaintiff's paper title which *bounds him on the line thus defined*. (*See fol.* 67–72, fol. 31, and pages 76–8.)

2. The plaintiff is also estopped from claiming that the *locus in quo* is within the Wolf tract, first, by the amicable settlement and practical location of the line in 1810, between Libbeus Scofield, under whom the plaintiff claims, and Joshua Caldwell, who then owned the respective lots; and secondly, by the arbitrament and settlement of the line in question between Morgan and the defendant, George Weiant in 1838. (*See fol.* 98, 104, 128, 129.)

Morgan, at the time of this latter settlement, was the owner of a conditional fee in equity in the land claimed by plaintiff. (*Fol.* 34, 35; 2 *R. S.* 135, § 10.)

Or Morgan was at this time, not the tenant, but the *agent of*

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the plaintiff in regard to this land, and his agreement as to the boundaries was conclusive on the plaintiff.

3. If the plaintiff, by either of these means, is estopped from claiming south of the green line, then no decision of the circuit judge in admitting or rejecting oral evidence of such claim can be the ground of a new trial. (*See 21 Wend. Rep.* 360—*Comyn on Landlord and Tenant*, 18, note *q.*; 2 *Smith's Leading cases*, 436, 459, 460; 1 *D.* 226.)

Third. The counsel for the plaintiff endeavored to bring into review in the supreme court the whole evidence in the cause, and the comments upon it of the circuit judge to the jury. The verdict in this cause was well warranted by the testimony. But were it otherwise, a verdict will not be set aside on a bill of exceptions and writ of error, *as against evidence*, no matter how palpably so; nor *for any comments by the judge upon mere matters of evidence or the weight of evidence*, no matter how erroneous. (2 *Chit. Gen. Prac.* 593; *Lucas v. Nockells*, cited 1 *Adol. and Ellis*, 15; *The People v. Haynes*, 14 *Wend. Rep.* 554; *Carver v. Jackson*, 4 *Peters Rep.* 80, 81; *Ex parte Crane*, 5 *Peters' Rep.* 199; *Bacon's Abridg.*, title, "*Bill of Exceptions*," 1 *D.* 571; 2 *H.* 205; *C. and H.* 787, 788.)

Fourth. The exception to the judge's charge at fol. 274 is *too vague and general to raise any particular legal question*. It is taken to the whole charge, including comments upon the evidence. It is rendered no more specific by adding to the general exception to the charge, the words "and each and every part thereof." It failed to call the attention of the circuit judge or defendants' counsel to *any particular point*, on which the plaintiff's counsel claim to have been overruled. (*Ex parte Crane*, 5 *Peters' Rep.* 191, 198, 199; *Camden and Amboy R. R. Co. v. Belknap*, 21 *Wend.* 354, 359, 360; *Graham v. Cammam*, 2 *Caine's Rep.* 168; *Ball v. Mannini*, 3 *Bligh's Rep. N. S.* 22; *Riab v. M^r Alister*, 8 *Wend. Rep.* 109, 111, 112.)

Fifth. The only portion of the judge's charge which lays down *any principle of law* is at fol. 267, and is unquestionably *correct, and favorable to the plaintiff*. The residue of the charge consists of comments upon the evidence and the weight that should be given to it, which the jury were at perfect liberty to

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disregard, and which we have seen is not the subject of a legal exception. (4 *Peters' Rep.* 80, 81, and cases cited under 3d and 4th points.)

Sixth. The judgment in this cause should be affirmed with double costs. (2 *R. S.* 618, §§ 32, 33.)

WM. NELSON, *Attorney for defendant in error.*

A. TABER, *of Counsel.*

JEWETT, Ch. J. The rule that courses and distances yield to natural and ascertained objects is well settled, and I do not know that it is disputed here. If there had been a known ground line between the Wolf and Kempe Tracts, that would have controlled the distance or chaining along the Dunderburgh Turnpike road called for by the defendants' deed. The circuit judge in charging the jury stated that upon a view of all the evidence, excepting that which arose out of the deeds, he was of opinion that the weight of it was in favor of the plaintiff's location, that is, as I understand it, that the line of the Wolf tract is where the line is drawn on the map from point P to point E.; but that the deeds afforded strong evidence against the plaintiff and in favor of the defendants. That is, that the fact that the chaining or distance along the turnpike road from point I on the map carried the line to the foot of the green line marked on the map, or beyond that point.

The judge instructed the jury that the description in the deed from De Forest to Moser, running 36 chains and 75 links along the Dunderburgh Turnpike road to the Wolf Tract, if not conclusive against De Forest, and those claiming under him, that the southerly line of the Wolf Tract was that distance from where the line north 45° east, mentioned in the deed, intersects the turnpike, (point I on the map,) was at least a strong recognition, under hand and seal, of the correctness of De Forest's description of the Kempe Tract, in his deed to Moser, and therefore, of the accuracy of the Gurnee and Parmenter line which crosses that turnpike at the end of 36 chains and 75 links, running from where the course north 45°, mentioned in the deed, intersects the turnpike.

The plaintiff's counsel excepted. I am inclined to think

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that too much importance was given to the distance of 36 chains and 75 links called for by the deeds under which the defendant holds his title ; I think it should have been submitted to the jury to find from the evidence where the line between the Wolf and Kempe Tracts was, and in doing that, it would have been entirely proper to have instructed them, if there was any doubt as to its location from the evidence, and of that which the course and distances described in the deeds indicated, that then it would be proper for them to look to that in connection with the other evidence, but that if they could ascertain from the evidence the location of that line, although the distance from point I at the turnpike road to the line of the two tracts fell short of 36 chains and 75 links, that must yield to the line thus found and ascertained.

After a careful examination of the evidence aside of that furnished by the course and distance, alluded to, contained in the deeds, I entirely agree with the judge at the circuit that the weight of it was in favor of the plaintiff's location.

And although I think the facts in the case did not warrant so strong an expression of opinion, as to the controlling effect of the deeds, yet I am of opinion that the exception to the charge does not raise any legal question ; nothing, as I can see, was said by the judge beyond commenting upon mere matters of evidence or the weight of it, and even to that the attention of the judge was not directed by the exception.

I am satisfied that there is no error in the decision of the circuit judge in allowing the defendant to give evidence of the interest of the witness Morgan, in the event of the suit, to affect his credit, nor in rejecting the deed offered in evidence on the ground it had been acknowledged in another county before a commissioner of deeds, on the ground that there was no certificate required by the statute. (1 R. S. 749, § 18.)

The plaintiff's counsel offered to prove that for thirty or forty years past, it had always been reported and understood in the neighborhood, that a monument in the shape of a Harrow marked a corner between the Kempe and Wolf Tracts. It was objected to, overruled, and an exception taken. The judge stated that he would allow witnesses who had seen the monu-

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ment to give evidence that such monument identically was known and reputed as one of the boundaries.

I am of opinion that the judge correctly shut out the proposed evidence. The *existence* of the monument could not be thus proved, consistent with any rule of evidence. It was merely hearsay, and not within any exception to the rule, that such evidence is inadmissible. (1 *Green. Ev.* § 145, n. 1.)

It is next objected that the judge at the circuit decided erroneously, in rejecting the evidence offered to show what Harmanus Hans, who was a chain-bearer in an old survey, made upward of thirty years before the trial, of the line between the *Wolf and Kempe Tracts*, then dead, told the witness before any controversies arose about the boundary line, respecting that survey and the boundary line, and the monument, and marks upon it.

It will be observed that it was not proposed to show the declaration of Hans made at the *time* the act was done, which they were supposed to characterize, but upon other subsequent occasions. It may be, that declarations by a chain-bearer, who is deceased, in making a survey of a line, made, at the time the act was done, in regard to the line run, and monuments reached, &c., would be admissible to prove the facts as part of the *res gestæ*. But the evidence offered in this case was mere hearsay, and not within any of the few exceptions to the rule which excludes such evidence as proof of a fact affecting a party in a court of justice, and, I think, was properly excluded.

Upon the same ground I think the evidence offered of the declarations of Morgan, the surveyor, were rightly excluded. It was said on the argument that he was the agent of the parties in making that survey, and that was urged as an additional ground for the admission of his declarations. But of that there is no evidence in the case. The evidence on that point is, that he was not, but was in the employ of the state. Be that as it may, the declarations proposed to be proved were made subsequent to the making of the survey, and were no part of the *res gestæ*; and admitting he had been the agent of the parties in making the survey, he could not affect the interests of either,

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by any subsequent declarations. Declarations of an agent must be confined to such statements as are made by him either at the time of the act done by him as such, about which he was employed or acting within the scope of his authority.

Evidence was given showing that Parmenter run a line between the Wolf and Kempe Tracts a few years before the trial, beginning at the split rock on the Hudson river in the line P. E., marked on the map, and run on that line within a chain or a chain and a half of point P. and made a monument. The plaintiff's counsel then proposed to prove, (Parmenter being dead,) that Parmenter when he made that monument or corner, *stated*, as a reason for not running quite to the *Harrow* monument, that there was so much dispute about the line, that he would not run further, so as to be certain of being within bounds. The evidence was objected to and rejected, to which there was an exception.

Although the evidence offered was hearsay, yet it constituted a part of the transaction which was the subject of inquiry. The act of Parmenter in stopping short of the *Harrow* monument, unexplained, would be more or less strong, to show, that the line run by him was not the true line between the two tracts, as it did not reach the monument called for. It was, therefore, material to show some reason, if it existed, why Parmenter did stop short of that monument, consistent with the principal fact, that his line, if run, would reach it; therefore I think to show the nature of Parmenter's act in stopping short of it, or his motives in so doing, proof of what he said at the time of doing it, was admissible evidence for the purpose of showing its true character. (*Cow. and Hill's Notes to Phillip's Ev.* 1 part. 585, note 444; 1 *Green. Ev.* § 108, n. 2.) On this ground, I think the judgment of the supreme court should be reversed, and a *venire de novo* be awarded.

GARDINER, J. One Parmenter was employed to run the line between the Kempe and Wolf Tracts, some two years before the trial; by whom does not very satisfactorily appear, but probably by Morgan, who was in possession, under Wood, the plaintiff below, under a contract for the purchase of the premises in question or some part thereof. A map made by Par-

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menter was used upon the trial. It appears that this surveyor in running the said line, stopped one or two chains short of the *Harrow* monument, a terminus which was in the same line, and which the plaintiff attempted to show was an original monument. Parmenter established a new monument at the place where he stopped. He died some time before the trial. One Morgan was called as a witness, and the plaintiff proposed to show by him, "that Parmenter *when* he made his corner stated as a reason for not running quite to the *Harrow* monument, that there was so much dispute about the line that he would not run further, so as to be sure that he was within bounds." This was objected to, and overruled by the circuit judge, and the plaintiff excepted.

The establishment of the monument was a part of the duty of the surveyor. The reasons for the act given at the time of its performance, and in explanation of it, were a part of the *res gestæ*, and competent evidence. A pile of stones of themselves indicate nothing. Whether they were designed to denote a corner, or the course of a line, or were put together for the purpose of marking the spot from which the survey was afterward to be continued, can in the nature of things be learned only from the declarations of those engaged in the survey. A line mark upon a tree, the map itself which was produced in evidence at the trial without objection, are merely declarations and explanations of the survey. And it follows that if Parmenter was authorized to establish a monument at all, that authority included the right to declare the purpose for which it was established. This was in effect the proposition of the plaintiff. He proposed to show that the surveyor, when he fixed the monument, placed it in a particular spot, not because he had run the distance called for by the deed, or because his survey led him to suppose that it was the corner of the land as originally surveyed, but from an avowed intention to avoid all controversy thereafter by stopping short of the true corner of the tract. In *Barclay v. Howell*, (6 *Peters*, 504,) one Wood was employed to fix upon the plan of the town of Pittsburgh, and to survey it. His declaration that a particular street should be left open to the river's edge, for the use of the town, was

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held admissible as a part of the *res gestæ*, as explanation of the act done. The principle is the same, whether the declaration relates to a street or monument. It is true that the evidence of the survey of Parmenter was offered by the plaintiff; no question, however, was made as to its competency at the trial, and of course cannot be entertained here. We must assume that it was properly admitted, and the declaration of Parmenter should have been received as a part of the survey. (*United States v. Brig Burdett*, 9 *Peters*, 689; 2 *Denio*, 141.)

DECISION.—Judgment affirmed.

BRONSON, RUGGLES, JONES, & JOHNSON, Judges, were for affirmance generally.

JEWETT, Ch. J., GARDINER, WRIGHT, & GRAY, Judges, were for reversal, upon the ground stated in the opinions of Judges JEWETT and GARDINER.

NOTE. The court affirmed the judgment in this case with an expression of approval of the opinion of the circuit judge upon one point only, to wit: that the law of 1833, ch. 271, § 19, had not changed the statute, (2 *R. S.* 325, § 74,) in relation to the reading of deeds in evidence; that the county clerk's certificate was still necessary.

Reported 1 Comstock, 77.

NOTE. JEWETT, J., arrives at the following results: That although the facts in the case did not warrant so strong an expression of opinion, in the charge of the circuit judge, as to the controlling effect of the deeds, yet, that the *exception* to the charge did not raise any *legal question*.

There was no error in allowing the defendant to give evidence of the interest of the witness Morgan in the event of the suit, to affect his *credit*.

Nor in rejecting the *deed* offered in evidence, on the ground, that it had been acknowledged in another county, before a commissioner of deeds, and that there was no *certificate* required by the statute.

That the *existence of a monument*, making a boundary between lands, could not be proved by *general reputation*.

That the *declarations* of a chain-bearer, (now dead,) in running a boundary line, made not at the *time* of the running of the line, but *afterward*, is not a part of the *res gestæ*, and are inadmissible as evidence.

It is otherwise, where such declarations are offered to be proved as made *at the time of the survey*.

And on the same principle, the declarations of a *surveyor*, made *subsequent* to the survey, are inadmissible as evidence to show a boundary line or monument, although he is claimed to have been the *agent* of both parties.

Because, the declarations of an agent must be confined to such statements as

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are made by him, either at the time of the act done by him as such, or acting within the scope of his authority.

But the *declarations* of a *surveyor*, (now dead,) made *at the time he made the survey*, giving certain reasons for stopping the course and distance where he did, &c., is *competent evidence*. It is a part of the *res gestæ*.

GARDINER, J., discusses but one point in his opinion, and arrives at the same conclusion thereon as Judge JEWETT, to wit: That if a surveyor was authorized to establish a monument at all, that authority included the right to *declare the purpose* for which it was established. And the plaintiff had a right to show such declarations as a part of the *res gestæ*.

THE PRESIDENT, DIRECTORS, & Co., OF THE BANK OF SALINA,
defendants in error, *agt.* HENRY & PIERCE, plaintiffs in error.

Questions discussed.

1. Whether a witness called as a *mere witness* and not as a *party* under the usury law, to prove, under the *plea of the general issue*, that a promissory note was *usurious* and *void*, was bound to answer, notwithstanding the objection, that his doing so might form a link in the chain of testimony tending to convict him of a misdemeanor, or expose him to a penalty or forfeiture?

2. Whether under the notice annexed to the plea, in pursuance of the Usury Act of 1837, the defendant might prove by the witness, (who was not a party to the record,) that he was the "*plaintiff in interest*," and also the "*usurious agreement*" on discounting the note? Or, whether the fact that the witness was the plaintiff in interest, must not be proved by some other witness?

3. Whether the statute of limitations, or the Usury Act of 1837, would be a protection to the witness on an indictment for usury, or in an action for a penalty or forfeiture?

This was an action of *assumpsit*, brought to recover the amount of a promissory note bearing date April 28th, 1838, for the sum of two hundred dollars, payable to the plaintiffs at their banking house, in Salina, at sixty-three days.

The suit was commenced by the filing and service of the declaration and notice of rule to plead under the statute. The declaration contained the common money counts, to which was annexed a copy of the note in these words:

"April 20, 1838.

"\$200. Sixty-three days after date, for value received, we

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jointly and severally promise to pay to the President, Directors and Company of the Bank of Salina, two hundred dollars, at their Banking House.

“O. B. PIERCE,

“S. H. HENRY, *Security.*”

To which was added a notice that said note would be given in evidence, under the money counts, on the trial. The declaration was served upon the defendant Henry, the 17th day of June, 1839, but was not served upon the defendant Pierce. The defendant Henry, appeared, and pleaded non assumpsit, and annexed to and served with his plea a notice of the defence of usury, and verified the same by affidavit according to the provision of the statute. The cause was tried before the Hon. DANIEL MOSELEY, Circuit Judge, at the Onondaga Circuit, on the 8th day of April, 1844. On the trial, the signature of the defendant Henry to the note was admitted, and the counsel for the plaintiffs proved the signature of the defendant Pierce to the said note, and the interest thereon, to be \$81,08, and rested. The counsel for the defendant then opened the defence to the jury, and in so doing, stated to the jury, among other things, that the note in question was made to be discounted at said bank, for the sole benefit of the defendant Pierce, and was signed by defendant Henry as his surety, and was in the first instance presented by the defendant Pierce to the said Bank of Salina for discount; that the bank refused to discount it; that this was known to Elisha Chapman, who was at that time the teller of the bank; that the said note was then subsequently presented to the said Elisha Chapman, who with full knowledge that the same had been presented at the bank and refused, discounted the said note, and in so doing, deducted \$10 from the face thereof, under a corrupt and usurious agreement between him and the said Pierce. The counsel for the defendant Henry, to maintain and prove the issue on his part, called and had sworn as a witness, Elisha Chapman; the note was then handed to the witness, and defendant's counsel proposed to prove by the witness under the plea of the general issue, that the note was usurious and void. This was objected to both by the wit-

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ness and the counsel for the plaintiffs, upon the ground that the witness was not bound to answer, as his doing so might tend to form a link in the chain of testimony tending to convict him of a misdemeanor, or expose him to a penalty or forfeiture. In support of such objection it was insisted that the said Chapman when called as a mere witness (and not as a party of record or interest) to testify to usury, was not bound to answer under the act to prevent usury, passed May 15, 1837. It was also at the same time further insisted that the said witness was protected from answering, under the 1st *Revised Statutes*, 597, sec. 30, 2d ed., and his honor, the circuit judge, sustained the objection, and defendants' counsel excepted thereto. The following questions were then put to the witness, all of which, on objections being made by the witness and the complainants' counsel, were overruled by the circuit judge, and were severally excepted to by defendants' counsel. Did you receive the note from O. B. Pierce in the year 1838? Did you in April, 1838, receive the note in question under some agreement with O. B. Pierce? Did you in April, 1838, make a usurious agreement with O. B. Pierce in relation to said note? Did you in April, 1838, discount the note for O. B. Pierce at \$10 less than its face? Did you in April, 1838, discount the note and reserve \$10 from its face under an agreement between yourself and O. B. Pierce? The above questions were objected to on the grounds above set forth. The defendants' counsel then offered to prove the usurious agreement by the witness, under the notice annexed to and served with the plea, on the ground that he, the witness, was then the plaintiff in interest. This was objected to, both by the witness and the plaintiffs' counsel, on the ground, 1st, that the witness could not be compelled to testify to usury under the notice and under the act of 1837, unless it should first appear that he was the plaintiff in interest and the owner of the note. 2d. That the witness could not be compelled to show himself to be the owner of the note in question, without subjecting himself to a penalty or forfeiture, under the section of the Revised Statutes above cited, or without establishing a link in the chain of evidence to subject himself to a penalty or forfeiture under that statute. The objections were

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sustained by the circuit judge, upon the grounds stated, and also upon the ground that the fact that the witness was the plaintiff in interest should be proved by some other witness. The defendants' counsel in due form excepted: the defendants' counsel then offered to prove by the witness that he was the plaintiff in interest in this suit and the owner of the note in question. This was objected to as well by the witness as the plaintiffs' counsel, and his honor, the circuit judge, sustained the objection upon the grounds last above set forth. Defendants' counsel then offered to prove by the witness, that he, the witness, discounted the note in question in the month of April, 1838, and ever since that time had been, and still was, the owner of the note, and was then the plaintiff in interest in this suit, and then to prove by the witness that he discounted the note at the time aforesaid, at a usurious rate of interest, and that the same was usurious and void. This was objected to as well by the witness as the plaintiffs' counsel, upon the grounds last above stated, and his honor, the circuit judge, sustained the objections, to which decision defendants' counsel excepted. The defendants' counsel then repeated the several questions to the witness in substance which were propounded to him under the plea of the general issue; and which on being objected to as before, were severally overruled by the circuit judge, and were severally excepted to by defendants' counsel. And the jury thereupon, under the direction of the circuit judge, rendered a verdict for the plaintiffs for the sum of \$281,08, being the amount of the said note and the interest thereon.

The supreme court at general term in January, 1846, affirmed the verdict, and judgment was thereupon entered in favor of the plaintiffs. (*Reported 4 Denio.*)



The defendants brought a writ of error, and removed the proceedings to this court.

Hough & Carpenter, Attorneys and
Wm. J. Hough, Counsel for plaintiffs in error.

First. The witness, Elisha Chapman, was bound to testify as a witness, generally, in the cause under the plea of the general issue. He was called as a mere *witness*, and not as *plaintiff*,

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under the usury law; and there was no evidence to show he was such plaintiff; and if he wished to excuse himself from testifying as such witness, he should have disclosed his interest as plaintiff. What he might say as to the agreement, on receiving usury on discounting the note, could not be given in evidence against him on an indictment for usury, or in an action for a penalty or forfeiture; the statute of limitations was a shield and protection in either case.

 No usury until the whole sum, principal and interest, has been paid—can't be indicted. 

Second. The defendants should have been permitted to prove by the witness, Chapman, under the notice annexed to the plea, that he was the "*plaintiff in interest*," and also the "*usurious agreement*" on discounting the note. The fact that he was *plaintiff in interest* was as much a part of the "*defence of usury*" within the meaning of § 2d of the Usury Act of 1837, as the very contract itself; and is as much within the spirit and meaning of the decision in the case of *Henry v. Bank of Salina*. (5 *Hill*, 523, in the *Court for the Correction of Errors*; *Stephens v. White*, *id.* 548.)

In the latter case, the offer was, to prove by the plaintiff in interest, that he "*was the plaintiff in interest*," and then the "*usury*;" and in commenting upon this offer, the chancellor said, "The case of *Henry and Pierce v. The Bank of Salina*, which had just been decided, disposed of this case. Both were alike in *principle*," &c. And the decision sustained the remark. The whole question is, therefore, *res judicata*.

Whether, by testifying, the witness would criminate himself, or subject himself to a penalty or forfeiture, or not, did not excuse him from answering. There is no constitutional protection, so far as relates to a penalty or forfeiture; and the legislature, by the Usury Act of 1837, has changed the common law rule in civil actions, so far as relates to parties and witnesses; and the 8th section of the act is a protection against any criminal prosecution. (*Henry v. Bank of Salina*, 5 *Hill*, 525-7.)

The Usury Act, at all events, compels the plaintiff, in usury cases, when called as a witness, to answer. Section 8 excuses

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him from criminal prosecution, and whether it subjects him to a penalty or forfeiture or not, he is bound to answer. And if the usury act did not protect the witness in this case, the statute of limitations did, as well against any civil action for a penalty or forfeiture, as against any criminal prosecution. (1 *Barber's Ch. Prac.* 283; 1 *Ph. Evidence*, 223, note a; *Close v. Olney*, 1 *Denio*, 319; *Roberts v. Ellatt*, 1 *Moo. & Mal. R.* 192; 1 *Cowen & Hill's Notes*, 739; *The People v. Mather*, 5 *Wend.* 229, 250-257.)

☞ 3 *How.* 515, 530, too vague. ☞

Noxon, Leavenworth, & Comstock, Attorneys and
G. F. Comstock & N. Hill, jr., Counsel for defendants in error.

First. Chapman was first called upon to testify as a witness at large and without any reference to the Usury Act of 1837. In this situation, therefore, none of the provisions of that act could be used, either to compel him to testify, or to protect him from the use of his testimony as an admission against him, for any purpose whatever, in case he should testify.

Second. The opening statement of the counsel for the defendants below, showed that Chapman had actually taken usury when he discounted the note in question. This was a criminal offence, and standing as a witness at large, without the protection of the act of 1837, he was not upon general principles bound to testify to the fact. (*Bouv. L. Dict.* and 17 *W.* 142-3.)

Third. The same opening statement showed that the note in question was discounted by Chapman in plain and direct violation of 1 *R. S.* 595, sec. 28, 1st ed. This statute subjected him to a penalty of twice the amount of the loan. On this ground, also, the witness was justified in refusing to answer. Also on the ground that under the same statute his answers would subject him to the loss of the note.

Fourth. The statutes of limitation afford no answer to the 2d and 3d points. *No such answer was suggested on the trial*; nor was it shown that proceedings had not been commenced against Chapman before the statutes had run.

(*See opinion of BRONSON, Ch. J., in this case, and the cases cited by him*; 17 *W.* 142-3.)

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Fifth. If the transaction stated in opening the defence, and sought to be proved, is to be regarded only as an *executory agreement* to take usury, then the offence was not complete until the usury was received. Of course the statute of limitations had nothing to do with this; yet the witness was justified in not answering on the ground that proof of the *usurious agreement* would be one link in the chain of testimony to show the offence wholly consummated. (*Burns v. Kempshall*, 24 *Wend.* 360; *S. C. in error*, 4 *Hill*, 468; *Cloyes v. Thayer*, 3 *Hill*, 564; see also opinion of BRONSON, Ch. J., in the present case; 19 *Ves.* 225; 4 *W.* 252-4; 3 *Taunt.* 424.)

The question is next to be considered with reference to the Usury Act of 1837. Chapman having next been called upon to testify under that act, and in pursuance of the notice required by that act—upon this branch of the case we say:

Sixth. The witness could not be compelled to testify under that act, unless he was plaintiff of record, or (as has been held) the owner of the demand, and therefore plaintiff in interest. He was not plaintiff, so far as appeared, in either sense of the word. This objection to the offer, in the form in which such offer was first made, is unanswerable.

Seventh. A witness called solely under the authority of the act in question, is not bound to swear whether he is the owner of the demand or the plaintiff in interest. He can only be interrogated as to the *usury*, and that after it appears in some other way that he comes within the statute. *There was no offer to prove by Chapman, as a witness at large, or by any other witness, that he was the plaintiff in interest.*



Eighth. As plaintiff in interest, Chapman was also justifiable in refusing to testify upon the ground that it would subject him to a forfeiture under 1 *R. S.* 595, § 28, above cited, or would at least establish a link in the chain of testimony to convict him of a violation of that statute.

1. This objection was as available to Chapman when called under the act of 1837, as it was when called as a witness at large, and that we have already considered. Under the cover of the act of 1837, a man cannot be compelled to swear to


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facts showing or tending to show a violation of some other penal law.

2. But the objection becomes more unanswerable when the witness is called as plaintiff in interest. If the note was discounted in violation of the provisions in the banking act above referred to, no recovery could be had upon it, and thus Chapman, ostensibly called under the act of 1837, would forfeit the amount of his note under another statute. The note would be void upon general principles, and is also declared to be void by 1 R. S. 604-5, § 10. No statute of limitation could save Chapman from this forfeiture; and this would be such a forfeiture as would excuse him from testifying. (1 *Phil. Ev. Cowen & Hill's ed.* p. 278; *Story's Eq. Pl.* 442, 443, 444, 445; 4 *Paige*, 439.)

 *Chit. Cont.* 6, 6th *Am. Ed.* §§ 579, 580; *Story's Const.*; 1 *Smith's L. C.*; 20 *Wend.* 320; 1 *Green. Ev.* 452. Eng. stat. declaring witness shall answer though it may subject him to a *civil suit*, held, that it applies to nothing else but the precise case. (2 R. S. 405, § 71.)—Still more guarded. (3 *P.* 532-3; 11 *W.* 330.) 


NOXON, LEAVENWORTH, & COMSTOCK,
Attorneys for defendants in error.

 N. HILL, Jr., same side—only discussed the last point, *Mitf. Pl.* 197, *Ed. of 1827*. Demurrer will lie to bill of discovery, which will subject defendant to any forfeiture of interest. (1 *Rep. Cas. in Chy.* 75, 77; *Tothill*, 80, *Wolgrove v. Cole or Coe.*) Courts of Eq. less tender of the wit. on this point than courts of law. In other respects, rule at law and equity the same.

Twelve judges differed in opinion, 8-4.—Act Parl. passed—not settled in this state till Revised Statutes—1 *Am. Law Jour.* 223, opinion of the twelve judges. (7 *C.* 177; 3 *R. S.* 737, *Revisers' Note*; 2 *Phil. and Ames*, 915-16; 1 *Greenl. Ev.* § 452. For Eng. Stat.—*P. and A.*—any forfeiture *whatsoever*.)

Our stat. very cautiously worded—so goes to specified case and nothing else. (1 *Greenl. Ev.* 451.) Wit., if he begins to

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ans. must answer fully.—He must object *in limine*. (3 *Pick.* 229; *Dwar. Stat.* 749–50, 736.) 

DECISION.—Judgment affirmed.

GRAY, J., delivered a written opinion in favor of reversing the judgment.

BRONSON & WRIGHT, J. J., delivered opinions for affirmance, in which the other judges concurred.

NOTE. *Held*, that as the answer of the witness might tend to establish facts which would work a *forfeiture of the debt*, (1 *R. S.* 595, § 28,) he was not obliged to testify. This ground of itself was sufficient to establish the privilege of the witness; and as to this, the statute of limitations had no application.

Besides, as to the grounds on which the privilege of the witness was put by the supreme court, the statute of limitations was not even mentioned on the trial. If the defendant intended to rely on this statute, he was at least bound to say so. A party is not at liberty to start a question, on a motion for a new trial, or in a court of review, which, had it been mentioned on the trial, might have received a satisfactory answer, (per BRONSON, J.)

Reported, 1 Comstock, 83.

STIEF, plaintiff in error, *agt.* HART, defendant in error.

Questions discussed.

1. Where personal property is *pledged* for debt and in the *possession* of the *pledgee*, and the sheriff having an execution against the *pledgor*, whether the sheriff may, by virtue thereof, take the property out of the hands of the *pledgee* into his own possession, and *remove* it, and sell the right and interest of the *pledgor* therein?

2. Whether, if *trespass* would lie against the general owner for interference with the *pledgee's* possessory title, it would lie against the sheriff for the same cause?

This was an action of replevin tried before Hon. JOHN W. EDMONDS, Circuit Judge, on the 11th April, 1845. The action was brought by Stief against Hart, as sheriff of the city and county of New-York, for taking a quantity of cloth caps and muffs from the possession and store of Stief in the Bowery, near Bay-

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ard-street, to an auction store corner Reade-street and Broadway, New-York, by virtue of an execution in favor of Ezra Willmarth, against Ezra Willmarth, Jr., received November 7, 1842.

Stief claimed to hold the goods by virtue of a pledge or agreement from C. & E. Willmarth, which was introduced and proved on the trial, as follows :

“Whereas, Mr. F. H. Stief, No. 32 Bowery, in the city, county, and state of New-York, has a quantity of caps from us to sell for us, he to have what profit he can make on them over and above the price at which they are invoiced, and has also a quantity of muffs on deposit from us ; therefore it is agreed by us, that, whereas we owe him a note, due this day, amounting to one hundred and twenty-three dollars and sixty-two cents, that he shall pay forty-three dollars and nineteen cents on said note, we to give him a new note for the balance, \$80,43, at 60 days, with interest, the said note to be returned to us ; the said \$43,19 being cash now in his hands for caps sold. And we do hereby agree not to withdraw said caps from him until said note is paid. He is to be responsible to us, or our order, for what property of ours that is now in his hands, after said note, or the amount thereof, is paid.

Dated New-York, May 18, 1842.

C. & E. WILLMARTH. [L. s.]

Signed and sealed in the
presence of Wm. Weimar.” } }

It was then proved that the debt to Stief was unpaid, and that a judgment had been recovered thereon against E. Willmarth, Jr.

It was proved that it was in consequence of Stief's representations, that the goods belonged to E. Willmarth, Jr., that the sheriff levied upon them. But Stief said at the same time that the sheriff could not take them—that they were given to him as security for a debt.

The value of the goods was proved by defendant, by E. Willmarth, Jr., a witness.

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The counsel for the plaintiff requested the circuit judge to charge the jury that if they believed, from the evidence, that the property levied on by the defendant while in the possession of the plaintiff had been pledged to him to secure the payment of a debt then unpaid, the sheriff, in taking the pledged property from the plaintiff's possession, was a trespasser, and the plaintiff was entitled to recover.

The circuit judge refused so to charge; but charged the jury that where property is pledged for debt and in the possession of the pledgee, a sheriff having an execution against the pledgor may, by virtue thereof, take the said property out of the hands of the pledgee into his own possession, and remove it and sell the right and interest of the pledgor therein.

To which charge the counsel for the plaintiff excepted.

The jury found a verdict for the defendant for the value of the property, and assessed his damages.



The supreme court affirmed the judgment rendered at the circuit.

The plaintiff brought error, and removed the judgment into this court.

Obadiah H. Platt, Attorney and

A. Taber, Counsel for plaintiff in error.

First. Stief had such a property in the goods, that he could have maintained trespass against the general owner, had he removed them without Stief's consent, and before the lien was discharged. (10 *Wend. R.* 318.)

 Sup. court decided this on authority of 6 *Hill*, 484. 

Second. If trespass would lie against the general owner for interference with Stief's possessory title, it will lie against the sheriff for the same cause, unless the sheriff, by virtue of an execution, can acquire a greater right of control over, and a greater interest in, the property of the execution defendant than the latter himself has.

Third. The 2d Revised Statutes, page 366, sec. 20, authorizes the "right and interest" of a pledgor to be sold on execution, but does not interfere with the rights of a pledgee.

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In this property, the right to the possession was in Stief, and of course the possessory title of the general owner had been divested, and could not be sold; yet the sheriff took the property from the possession of Stief; an act which the general owner himself could not do.

Fourth. The greater power includes the less; and if sections 20 and 23, as declared by the court in 6th *Hill*, 484, gives the sheriff the power to have the property in view when sold, that power may, and therefore ought, to be exercised without removing the property from the possession of the pledgee. If the sheriff can remove, he can also enter upon the pledgee's premises to sell, and may advertise it to be sold without removal, and thus leave the rights of the pledgee undisturbed.

Fifth. The statute does not confer upon the sheriff power to remove the property, because,

1. At common law, the sheriff could not remove pledged property without paying the lien; (*Story on Bailment*, 238, sec. 353;) though the "right and interest" of the pledgor could be sold on execution. (4 *Wend.* 292.)

2. The statute, secs. 20 and 23, 2 *R. S.* 367, does not alter, but is merely declaratory of the common law. (*Revisers' Notes*, part 3d, chap. 6, title 5, secs. 17 and 20; 17 *J. R.* 116; 14 *do.* 222.) Except that as to power of sheriff to sell assigned or bailed goods, the decisions were conflicting. (*Revisers' Notes*; 5 *J. R.* 345; 4 *Cowen*, 469.)



3. If "personal property" in the 23d section includes the "right and interest of a pledgor in the 20th section, then the last clause of the 23d section must also apply to pledged property, and the sheriff who takes it must offer it for sale in such "*lots and parcels as will bring the highest price*;" whereas pledged property must be sold in one parcel, and *cannot* be divided.



Sixth. To allow the sheriff to remove the property from the possession of the pledgee would impair his security; as if the sheriff should destroy, sell or make way with the property, the pledgee would have only the sheriff's personal responsibility, which might be, and in *this case was good for nothing*, the *sheriff* being largely *insolvent*.

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Seventh. The sheriff did not in any manner recognize the pledgee's lien, but proceeded in hostility to, and denial of it, as appears from the evidence; and the court should therefore have charged the jury that the sheriff was a trespasser. (23 *Wend. R.* 653, 668, 669.)

O. H. PLATT, *Attorney for plaintiff.*

 I shall take a narrower view than in these points—the simple question decided by the judge. (34–5.)—At common law, judgment and execution give the sheriff no greater right over the property than the defendant himself has. (*Sewell's Law of Sheriffs*, 225; *Com. Dig. Exn. c. 4.*) Sheriff cannot take goods in pledge. (*Brooke's Ab. Pledge*, pl. 24.) May be taken on execution on satisfying the pledge. (*Brooke's Ab. Exn.* pl. 107; *Sewell Sheriff*, 242.) Sheriff cannot sell *absolutely*. (*Story Bailt.* § 286.) Not liable to be taken in execution, at least not unless the pledge is at an end. *In this state of the law comes our statute.* Decision of supreme court carries the statute by construction further than it ought to go; ought to be restricted, as statute against the common law. 6 *Hill*, 484, our case decided on this case. Must be sold *in one lot*. Statute for selling in *parcels* cannot apply. (2 *Dwar. Stat.* 750.) Construction of statutes.—Powers derogatory to private property must be construed strictly. (*Lofft.* 438.) Statute giving a new remedy construed strictly. (2 *id.* 63; 4 *Hill*, 76; *Cowp.* 26; 4 *Mass.* 473.) 

 *REPLY.*—As to remedy against partners. (*Coll. on Part.* 478, note 197, 3d *Ed.*; 2 *Ves. and B.* 301; 3 *B. and P.* 288, 289.) 

Joseph C. Hart, Attorney and
Samuel Stevens, Counsel for defendant in error.

First. The statute confers the right of levy upon goods pledged. (2 *R. S.* 290, § 20, 2d *edition.*)

Second. Personal property cannot be sold, unless the same be present, and within the view of those attending the sale. (2 *R. S.* 291, § 23, 2d *edition.*)

Third. The sheriff, having the right to levy, has the right to

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do all that the law requires to enable him to sell. (*Burrall v. Acker*, 23 *Wend.* 61; 014 *J. R.* 352; 15 *J. R.* 179.)

Fourth. He had the right, therefore, to remove the property to a place of safe deposit, and he is not a *trespasser* for so doing. (*Scrugham v. Carter*, 12 *Wend.* 134; *Randall v. Cook*, 17 *Wend.* 58; *Phillips v. Cook*, 24 *Wend.* 395; *Waddell v. Cook*, 2 *Hill*, 47, note; 4 *Hill*, 161, *affirmed last Dec.*; *Ray v. Birdseye*, 6 *Hill*, 484.)

Fifth. The judgment ought therefore to be affirmed.

J. C. HART, *Attorney for defendant in error.*

☞ This is a remedial statute, and must be beneficially construed. ☞

DECISION.—Judgment affirmed, on an equal division of the judges.

JEWETT, Ch. J., and RUGGLES, J., delivered opinions for affirmance, in which BRONSON and JONES, Judges, concurred.

GARDINER, GRAY, and WRIGHT, Judges, delivered opinions for reversal, in which JOHNSON, J., concurred.

NOTE.—*Held*, that the 20th section of the statute (2 *R. S.* 366) authorizes the sale of the “right and interest” of the *pledgor* in goods and chattels, on execution against him. And the 23d section of the same statute declares that no *personal property* shall be exposed for sale, unless the same be *present* and *within the view* of those attending the sale. And that the term “*personal property*,” in the 23d section, applied to and included the term “*right and interest*,” mentioned in the 20th section, as regards the regulation and sale of pledged goods.

Consequently, the right of the sheriff to *take* and *hold* the goods preparatory to a sale of such right and interest, arises by *necessary implication*. Whenever a power is given by statute, everything necessary to making it effectual, or requisite to attain the end, is implied.

Reported 1 Comstock, 20.

LEE, plaintiff in error, *agt.* BENNETT, defendant in error.

Questions discussed.

1. Whether the *opinion* of a witness to prove that certain matter published in a newspaper was "*the reports*" of the plaintiff, was competent evidence? The question was this: "From that printed copy, can you state whose reports they were?"

2. Whether the *evidence* relied upon before the justice to *raise a promise* on the part of the defendant below, (Bennett editor and proprietor of the Herald,) to pay the plaintiff, (Lee,) for reporting, was sufficient for that purpose?

This case came before the court upon a writ of error to the supreme court.

The action was originally brought by the plaintiff in error against the defendant in error, before Ambrose Kirtland, Esq., one of the assistant justices of the city of New-York, to recover for alleged services, rendered by the plaintiff as a reporter for a newspaper.

The evidence is taken from the justice's return.

Enoch E. Camp was called as a witness on the part of the plaintiff, who made default, whereupon the plaintiff's attorney moved for an attachment against the said Enoch E. Camp, and made proof of the service of a subpoena on the said Camp, and I refused an attachment, stating, I did not consider that any authority was given me to issue compulsory process to compel the attendance of a witness, but I did grant an order for the said witness to appear before me and show cause why a fine should not be imposed on him for his non-attendance as such witness. The plaintiff not requesting an adjournment on account of the absence of the said witness, the said parties proceeded to the trial of the cause.

John S. Doyle was called, and sworn as a witness on the part of the plaintiff, and was then examined by the attorney for the defendant as to his interest, and testified that he was not interested in the event of this suit.

On his direct examination he then testified, I am not now in the defendant's employ, I was in the month of January last as reporter. I was absent from this city in the month of January

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last, by the directions of Bennett specially given. I was absent I know 18 days, and I think 20 days—not less than 18. I saw the New-York Herald during my absence, and I am acquainted with the style of writing of the plaintiff. I saw the plaintiff once in the establishment of the defendant, at which time he handed me the result of a trial: it was a verdict, which trial I do not recollect: it was the cause of Leitga or Williams: it was 11 or 12 o'clock at night, perhaps later, plaintiff came into the office and went up stairs with it: he went to the composing room: I think he handed it to me: I recollect his handing in the verdict at the time I left the city. The defendant said nothing about my getting a person in my place. The following question was then put to the witness by the attorney for the plaintiff. Can you state whether it was necessary for the interest of the defendant to employ a person in your place during your absence?

This question was objected to by the attorney for the defendant, and the objection overruled, and the witness answered, it was; he was compelled to do so, to keep up with the other small papers. Can you state whether the plaintiff did reporting during your absence for the defendant, from your own knowledge? Answer, I recollect his once handing in the verdict, at another time going to the circuit at the trial of Leitga, and receiving from Mr. Lee the minutes of the proceedings of that trial for publication in the Herald, and further, that the foreman of the Herald establishment mentioned to me, and the witness was about stating what the foreman stated, when it was objected to by the attorney for the defendant, and the objection sustained. I saw a manuscript in the plaintiff's hand-writing in the defendant's office, during, I think, the progress of these trials in the circuit court, during the month of January: the manuscript was published in the Herald, the next day, during my absence from the city. I saw the Herald almost daily. Did you see the plaintiff's writing in the Herald during your absence? This question was objected to by the defendant's attorney, and the objection overruled. Answer, I read the reports—I did not see the literal writing of the plaintiff, I saw the printed copy. From that printed copy can you state whose

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reports they were? The answer to this question was objected to, and the objection sustained. I don't know that the manuscripts of reports are destroyed, I never knew any to be destroyed or to be kept; I am acquainted with Mr. Camp; he was a police reporter in January last for the New-York Herald. Mr. Camp employed me to report for the Herald, and paid me for doing his own work; he never reported, to my knowledge, for the civil courts; the price of reporting, at the lowest calculation, is \$1 per day. Question by plaintiff's attorney: Did you ever see a bill for reporting by the plaintiff against the defendant? Answer, I did. What did you do with it? Answer, I examined it, wrote the word correct on it, marked it with my initials, and laid it on defendant's desk. I never had a conversation with the defendant about it; he was not present when I certified it; I called upon the plaintiff upon my return to the city for a copy of the reports; I had no authority to call on him for a copy of the reports.

Question by plaintiff's attorney: How did you know it? Answer, I was told it.

Cross-examined, the said witness further testified, When I was absent from the city, I was about Mr. Bennett's business at Staten Island and at Newark. I am not now in Mr. Bennett's employ; I was reporting at Staten Island two murder cases—Polly Bodine, and Newark case, Marshall's trial. There were reporters from every paper in the city; I know it is a fact may be one or two papers that had not reporters; I was absent, and when I returned I got some copy from Mr. Lee; I can't say it was the same copy I saw in the Herald office; from its being published in the Herald the next day, I know it was the same.

Direct examination. Before I became acquainted with the Herald, I reported for Mr. Camp during his (Camp's) temporary absence or illness; he paid me; Mr. Sutton first employed me to make law reports for the Herald; the defendant was in Europe at the time. In Mr. Bennett's absence I was paid by the book-keeper of the Herald; after he returned, he knew I was employed to report, and continued me and increased my

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salary. I never knew Mr. Bennett to employ Mr. Camp in any department except as general reporter.

Thomas Towndrow was then sworn as a witness on the part of the plaintiff, and testified as follows :

I am a reporter and slightly acquainted with Mr. Bennett ; I have done reporting for the New-York Herald ; Dr. Houston employed me ; defendant was present when I was paid for it ; he ordered the clerk to pay me ; I am satisfied that defendant did not know I was employed till I presented the bill ; when I called with the bill, Dr. Houston introduced me to Mr. Bennett, and stated I was the person who did reporting ; I reported six times ; I was paid for reporting three times, and I have not brought in any bill for the rest ; I am acquainted with Mr. Lee, he is competent to report for the Herald ; he is considered an excellent reporter ; the Herald is printed with very fine type ; it is customary for principals or editors to employ other reporters, in the absence of their own regular reporters, or to perform extra services ; the value of reporting transient work is at a higher rate than permanent ; I should think regular work for a month, or two months, worth from one and a half to two dollars a day ; in lengthy trials, when the court sits late at night, such as the cases of Williams and Leitga, it is worth from two to three dollars a day.

Cross-examined. I report for the New-York Citizen. I superintend the whole reporting department. They have another reporter for the evening ; I am the regular daily reporter ; there is not any custom, to my knowledge, about sub-reporters being paid by principal reporters. I only speak as far as I am concerned myself.

Direct examination. What was Dr. Houston's business when you was employed by him ? Answer, He was reporter to the Herald.

Charles McLaughlin was then sworn as a witness on the part of the plaintiff, and testified. I am a reporter for the Express. I know the parties to this suit. Mr. Lee is competent to report for the New-York Herald. I never did any reporting for the Herald. I know Mr. Camp ; he is a police reporter for the Herald ; it is not customary for police reporters to report law reports ; it was impossible for one man to report the police

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sessions and law reports at the same time during the month of January. I never knew Mr. Camp to report law cases. Our establishment have two regular law reporters; it is worth one dollar and fifty cents, or two dollars a day for law reporting.

No evidence being adduced on the part of the defendant, the testimony closed, and after the attorneys for the respective parties had taken up considerable time in arguing the case, I inquired whether any evidence had been given that the defendant was the editor and proprietor of the New-York Herald, whereupon the attorney for the plaintiff asked the attorney for the defendant to consent to the introduction of a witness for that purpose, but which consent the attorney for the defendant refused to give, and objected to the introduction of any further testimony. The attorney for the plaintiff then offered to introduce a witness for that purpose, but I refused to allow further testimony, stating as a reason, that it would be improper at that stage of the case, and after the witnesses had left court. The said cause was then submitted on the 19th day of March, 1844. I rendered judgment in favor of the defendant, and for his costs.

AMBROSE KIRTLAND,

Assistant Justice.

The plaintiff sued out a writ of *certiorari*, and removed this judgment into the superior court, and after consideration, that court reversed the judgment of the assistant justice.

The defendant then sued out a writ of error and removed the judgment thus reversed into the supreme court, and after mature deliberation, the supreme court reversed the judgment of the superior court, and affirmed the judgment given by the assistant justice.

The plaintiff below then sued out this writ of error to reverse the judgment of the supreme court, and to procure an affirmation of the judgment of the superior court.

The superior court reversed the judgment of the justice upon the ground that the justice had erred in excluding the opinion of the witness Doyle, offered to be given in evidence by the plaintiff, upon the reading by the witness of a printed copy of matter contained in the defendant's newspaper, that the matter

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so printed was the composition or "*the reports*" of the plaintiff.

*Thomas Warner, Attorney and
John Graham, Counsel* for plaintiff in error.

First. The evidence before the justice was sufficient to require him to render a judgment in favor of the plaintiff, *for something*. It showed :

1. That the regular reporter of the Herald was absent. (*Error Book, fol. 19.*)

2. That it was necessary some person should fill his place ; and that no person (*at least other than the plaintiff*) was provided by the defendant. (*Error Book, 20, 21.*)

3. That the plaintiff furnished reports for the paper. (*Error Book, 19, 20, 21.*)

4. That they appeared in it. (*Error Book, 25, 26.*)

5. That they could not possibly have escaped the observation of the defendant.

6. That in rendering the services for which he sought to recover, the plaintiff was acting in concert with the acknowledged employees or agents of the defendant, *in the course of his business*.

From these facts, the justice would have been warranted in inferring, *either* a direct employment of the plaintiff by the defendant, *or* the recognition of his employment by persons connected with his (the defendant's) establishment.

Second. With reference to the defendant, a request to the plaintiff, or the employment of the plaintiff, may be inferred "*from the beneficial nature of the consideration, and the circumstances of the transaction.*" (*Oatfield v. Waring, 14 John. R. 188 ; 2 Kent, 613.*)

Third. No matter what may have been the powers of Doyle, (the regular reporter of the paper,) as between himself and the defendant ; his acts as between the defendant and an innocent third party (*and the plaintiff is such*) would be conclusive upon the defendant.

The principle is well settled, that an agent "*pursuing his power as exhibited to the public,*" binds his principal, no matter

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how he may be limited by "private instructions." (2 *Kent's Com.*, 4th ed., 621.)

Fourth. The defendant appears to have considered it a right, incident to the situation of reporter to his paper, to employ an assistant, when necessary.

See the evidence of Thomas Towndrow, Error Book, fol. 27 to 30, by which it appears that he was so employed by Dr. Houston, a former reporter to the paper, to assist in reporting, and that the fact was not known to the defendant until he presented his bill, and that the defendant ordered it to be paid.

The principle of law on this branch of the case is, "that the prior conduct of the principal affords just ground to infer a continuance of the agency." (2 *Kent's Com.*, 4th ed., 614, 615.)

Fifth. The foreman of the Herald establishment seems to have been cognizant of the acts of the plaintiff. He was a general agent, and, as such, his ratification of the plaintiff's acts would conclude the defendant.

It is true there was no evidence as to what the duties of foreman were; but the business of the defendant was apparent, and that, coupled with the etymology of the word would leave little doubt as to the nature and extent of his powers. The law presumes them to be commensurate "with the obvious purposes, and the general usage, scope, and course of the business, for which the agency itself was apparently created." (2 *Kent's Com.*, 4th ed., 620-622, particularly note C, in page 621; *Anderson v. Coonley*, 21 *Wend. R.* 279; *State Bank v. Wilson*, 1 *Dev. R.* 484; *Walker v. Skipwith*, 1 *Meigs R.* 502; *Barry v. Foyles*, 1 *Peters S. C. R.* 311.)

Sixth. The decision of the justice, in excluding evidence as to the declaration of the foreman of the Herald establishment, was erroneous. (*Error Book, fol. 21, 22.*)

1. In the very nature of things, the foreman must have been a general agent, having the powers of such an agent.

2. Although there may have been no proof as to his powers, it was matter of legal presumption, from what facts did appear. *See 5th point, and authorities cited under it.*

3. It was enough for the plaintiff to show that he was foreman, to be entitled to the most liberal inferences as to the ex-

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tent of his powers. If the defendant had sought to restrict them, the better proof lay with him. For authorities on this point generally, see fifth point.

Seventh. The justice erred in excluding the question put to the witness Doyle, in relation to the plaintiff's reports. (*Error Book*, fol. 23.)

The rule of law, allowing the opinions of witnesses as evidence, is not confined to mere questions of skill or science. In matters respecting *judgment* alone, they are competent. (*McKee v. Nelson*, 4 Cow. R. 355; *Morse v. The State of Connecticut*, 1 Conn. R. 9; 2 *Phillips' Ev.*, Cowen and Hill's ed., 759 to 763.)

JOHN GRAHAM, *Counsel for plaintiff in error.*

The following is a copy of the judgment of Chief Justice JONES, which is here introduced, the same being omitted by mistake, in the case :

"This case came up on certiorari, from the 2d ward court. The plaintiff sued the defendant for work and labor done on a newspaper called the Herald, and the case was tried before Justice Kirtland, who gave judgment for the defendant. At the trial a witness was produced, who said he was a reporter, and well acquainted with the plaintiff, and with his style of reporting; and a report being shown to the witness, and he asked if he could say if that was the work of the plaintiff.

"The question was objected to and overruled by the justice. In this decision this court thinks the justice's opinion of very doubtful propriety, as it is very important for the rights of the plaintiff for him to show, that the report in question had been prepared by him, and testimony to show that the reports were the work of the plaintiff would be material. The gist of the question was to show that the plaintiff was the author or reporter of the article, and the internal evidence of his style would be material. Although it may be admitted to have been but of a low degree in evidence, still it was of some value, and ought to have been received. It was said to have been of the same character as a comparison of handwritings, and resembles that kind of proof which is always admitted by the courts,

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where there is no proof or acknowledgment; but there were other and more serious objections to the judgment rendered by the justice; for, after the testimony had closed, the justice appears to have remarked that it was not in proof that the defendant was the editor and proprietor of the Herald. And when the plaintiff offered to supply that defect, it was rejected.

"Now, if the defendant was not the editor and proprietor, then was the judgment wrong; for it would have been a proper case for a non-suit. Therefore we think that the ends of justice required the witness to have been examined to that point, and that the same should have been done.

"In this, therefore, the justice erred.

"It was also in evidence that the regular reporter of the paper had been absent, that the plaintiff had been engaged to report, had been at the office with MSS. And throughout the trial the defendant had been spoken of as the proprietor of the Herald; and one witness had stated that the bill of the plaintiff had been audited and laid on the desk of the defendant for payment. We think this testimony clearly sufficient to have entitled the plaintiff to have recovered something, although perhaps not the whole of his claim.

"This court is therefore of opinion that the justice has erred, and that his judgment ought to be reversed."

Benjamin Galbraith, Attorney and

Edward Sandford, Counsel for defendant in error.

First. Was the opinion competent within the established rules of evidence?

We respectfully submit that it was not. The testimony of witnesses in courts of justice is confined to facts within their knowledge, and all inferences and opinions to be drawn from such facts belong to the jury, and in this instance belonged to the justice himself.

The opinion of the witness offered in this case does not come within any of the exceptions to the rule that witnesses must testify to facts and speak from personal knowledge. The exceptions admitted are in matters of skill and judgment, when men of science and experience are allowed to give their opin-

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ions in evidence. They are founded upon the supposition that the witnesses possess peculiar knowledge and understanding of the subject upon which they are to testify. Here no fact existed to which the application of the peculiar literary knowledge of Mr. Doyle, if he possessed any, could be made with any degree of legal certainty. It would be an opinion founded upon the merest conjecture.

1. Because, in a correct report of the proceedings of a public trial, there can be no such thing as a peculiar or distinguishing style. All the peculiar merit there can be in the reporter is to give a faithful transcript of the proceedings; over the form, order and language of a correct report he can have no creative power and no substantial control. Two good reporters, writing down for publication the same proceedings, could not vary materially in their narratives.

2. If there could be any such thing as a literary style in reporting, belonging to the reporter, by which his works could be distinguished from the works of all others, in the performance of the same service, it must be the great accuracy with which the sayings and doings are recorded. Those who approached most nearly to the same degree of accuracy, would necessarily very much resemble the more accurate.

All styles of writing are easily imitated. It certainly has not been before attempted in any court of justice, to prove that a printed article is the composition of any man by putting the printed paper in the hands of a witness, and taking his opinion as to its being in the style of the assumed writer. In all the actions for libel in England and in America, it has never been attempted to prove that the defendant was the author of the libel complained of, by an opinion of a witness as to *the style* of the composition.

In all the indictments and trials for treason, and for libel upon the king, which took place in the worst days of English jurisprudence, when the paramount consideration with the judges was, whether there were danger to the government, if illegal evidence were not admitted, it was not suggested by the most daring and profligate, that an opinion of a witness as to *the style* of the accused could be received to prove the authorship.

A reference to the case of Algernon Sidney, and the case of the seven bishops, and a glance at the arguments of the judges in favor of admitting proof of handwriting by comparison, will show that little scruple existed as to the mode of proof to procure conviction, and yet this seems not to have been thought of. In the act of Parliament, reversing the attainder of Sidney, it was declared that a comparison of handwritings is not legal evidence. Such has ever since been the law of England, and has ever since been the law of this state. (*Vide Johnson v. Phillips*, 9 Cow. 94-112.)

The general doctrine upon which the admission of opinions of witnesses rests, is very clearly set forth in the judgments of the supreme court of this state, in the cases of *Norman v. Wells*, 17 Wend. 136-161, and *Lincoln v. The Saratoga and Schenectady Railroad Co.*, 23 Wend. 425.

The principles of these cases will clearly show the inadmissibility of the evidence rejected by the justice, and the legal correctness of his decision.

This was the only point of law raised in the case, and we understand the judgment of the superior court to have been placed upon this ground.

Second. If the superior court could or did examine the propriety of the judgment of the justice upon the facts in evidence before him, we submit, that the judgment of the justice was correct, and should not have been reversed.

The law has been settled by this court in *Noyes & Pettengill v. Hewitt*, 18 Wend. 141, that where, on a trial in a justice's court, there is evidence on both sides, or only slight evidence, in support of the claim; a court of common pleas (and in this case the superior court) is not authorized on *certiorari* to reverse the judgment, although upon the facts of the case they may arrive at a conclusion different from that drawn by the justice where he decides the cause. It is also settled by the same case, that the supreme court is not concluded by the judgment of the court below, in a *certiorari* case, from reversing the judgment of that court, on the assumption that such judgment was rendered on the facts of the case. It was previously the settled doctrine of the supreme court, that a court of common

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pleas, on *certiorari*, had no right to reverse the judgment of a justice, because they came to a different conclusion as to the facts from that arrived at by the justice. The decision of the justice, where he decides the cause, stands upon the same principles with the verdict of a jury. To him belongs, in such a case, the determination of the credibility of witnesses, the weight of evidence, and as a general, if not a universal rule, his decision upon such question is final. He knows the witnesses and hears them testify, and if they fail to convince his mind, how can a court that never saw or heard them venture to pronounce him in error in his judgment? *Stryker v. Bergen*, 15 *Wend.* 490, is in point. And in *Oakley v. Vanhorn*, 21 *Wend.* 305, Mr. Justice COWEN says, the common pleas do not sit to grant a new trial upon the weight of evidence.

Keeping these principles in view, a reference to the evidence upon which the justice decided that the defendant was not to be charged in the action before him upon an implied assumpsit, will show that the proof was of such a slight and inconclusive character, that it might reasonably have failed to convince his judgment, and that the superior court have exercised an authority not entrusted to them by law, in reversing that judgment.

The circumstances relied upon before the justice to raise a promise on the part of defendant below to pay the plaintiff were these :

In January, 1844, Doyle, the reporter of the defendant, was sent by his direction to Staten Island, and was absent about eighteen days. The defendant did not deem it proper to employ any reporter in his absence, and did not do so, nor did he authorize any one else to do so.

The plaintiff was seen by Doyle once in the establishment of the defendant, where he handed Doyle the result of a verdict in a trial. This was eleven or twelve o'clock at night, and plaintiff went up to the composing room, where he handed it to Doyle.

The justice very improperly and illegally admitted the opinion of Doyle, as to the interests of the defendant requiring a reporter in the absence of Doyle ; but as he afterward disre-

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garded it, we advert to it, to say that no legal inference can arise upon this part of the evidence.

The plaintiff at the circuit court handed Doyle the minutes of proceedings of Leitga's trial for publication, and Doyle saw a manuscript in the handwriting of plaintiff, in the office of the Herald, which was published. Upon this plaintiff made out a bill against defendant and handed it to Doyle, and Doyle marked it "*correct*," and laid it on defendant's table. Defendant did not recognize it in any manner, nor had he any knowledge of it until it was left. Doyle called on plaintiff for the reports without any authority. It also appeared that Mr. Camp was the city reporter, employed by defendant, and was his general reporter at the time Doyle was sent away by defendant.

The plaintiff then called a witness, Towndrow, to show that defendant had paid him, without any previous knowledge as he supposed, that this witness had done reporting, to prove that in law he was bound to pay any body, and every body, who handed in reports which were printed in his newspaper. Although Mr. Bennett was ignorant of the name of this witness, it is apparent, from his statement, that he was not ignorant of the fact of his having been employed by his agent, Dr. Houston, to do the work for which he directed him to be paid.

It appears that Dr. Houston was also employed by defendant as general reporter.

The plaintiff then proved by M'Laughlin, that, in his opinion, Camp could not report the police, sessions, and law courts, and that the Express had two reporters.

Towndrow proved that the Citizen had but one reporter for all these courts. It had a day reporter, and a night reporter—but he destroys the grounds of opinion specified by M'Laughlin, to show that Camp could not do the work.

The whole case is this. In January, 1844, defendant had as regular reporters, Dr. Houston, Camp, and Doyle, the last of these being Doyle. He sent Doyle to Staten Island, to do reporting there, giving him no other authority and no other business.

At some time when Doyle was not absent, plaintiff came in and handed Doyle the result of a trial, at whose request it does

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not appear, but certainly not at the defendant's, as Doyle was there and employed in that business. At another time, under similar circumstances, Doyle applied to him for, and obtained, some minutes of a trial, and at another time saw some manuscript in the plaintiff's handwriting in defendant's office, which was published: Doyle swears expressly that all his transactions with plaintiff were without any authority from, or knowledge of defendant.

On this case the legal question arises, can one man thus voluntarily, without any request, and without any knowledge of his acts, make himself the creditor of another?

If he can, the pockets of our citizens are alarmingly exposed to a most extensive application of this new species of implied assumpsit. Editors and publishers of newspapers, who receive from all hands and all quarters reports and communications, and print them as items of general intelligence or to oblige parties offering them, can never know the nature or extent of their liabilities. That a manuscript in the handwriting of an assumed creditor was seen in the printing office, and appeared in the paper, should be held to imply a contract to pay for writing it, would introduce a most extreme and dangerous laxity.

That a person employed by the publisher to procure and prepare reports for his paper, should request another person in the same business to hand them to him, without the authority or knowledge of his employer, and should furnish them as his own, and after being paid himself, turn around and convert the volunteer into a creditor, and support his claim by such evidence, is a proposition to which no court of justice can assent.

The case is a small one in its amount, but the principle is important to the defendant in error, and the evidence introduced to charge him with the claim sought to be recovered was wholly of a most unprecedented character. The idea that the defendant below was bound to pay, because if he did not employ the plaintiff, two gentlemen of the profession of newspaper reporting deliberately expressed their opinion that he ought to have employed *somebody*, was only equalled by that other truly great

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conception, that because defendant had paid one man, who conjectured that defendant was ignorant of his having rendered service at the time he did it, he was bound to pay all volunteers who chose to intrude themselves into his business or to intermeddle with his affairs.

An examination of each particular circumstance will show its entirely inconclusive character, and leave no doubt upon the mind, that although the justice erred in admitting evidence, he came to the correct legal conclusion upon the proofs, and that if his judgment has been reversed on this ground, the superior court have erred, and the judgment of the justice and of the supreme court should be affirmed.

There was no request, assent or adoption on the part of defendant, no circumstance proved in the case, from which the law could imply either.

That a request, direct or inferential, must be proved, is a proposition too elementary to require any authority. If one accepts or knowingly avails himself of the benefit of services done for him without his authority or request, the law binds him to pay a reasonable compensation for them. But here there was no knowledge whatever, and no acceptance, because the services rendered were those which defendant had employed others to render, and he had no intimation that they had not been performed by them, or that the plaintiff had performed them.

There was a point raised in the return which is destitute of any plausible foundation. The justice excluded what the foreman of the Herald establishment stated to the witness as mere hearsay. He should have been called to have proved any facts within his knowledge. As foreman, it did not appear that he had any authority to act for the defendant in relation to the matters in controversy; and the declarations of an agent are never received except where it is shown that he speaks as a mere instrument of his principal; no authority was proved, and his declarations were properly excluded.

Another point, more frivolous; was raised, upon the refusal of the justice to issue an attachment, when the plaintiff did not ask an adjournment, but voluntarily went on to trial.

Upon the law of the land applicable to this case, we ask

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that the judgment of the justice and of the supreme court be affirmed.

BENJAMIN GALBRAITH, *Attorney for defendant in error.*

EDWARD SANDFORD, *of Counsel.*

6 (6 *Wend.* 268; 4 *Wend.* 249; 2 *Cowen & Hill*, 702-3; 4 *Hill*, 202) goes the farthest. ❏

DECISION.—Judgment affirmed.

For affirmance, JEWETT, Ch. J., BRONSON, GARDINER, RUGLES, WRIGHT; GRAY, and JOHNSON, J. J.

For reversal, JONES, J.

The supreme court *held*, (JEWETT, Justice, delivering the opinion,) that assuming that the defendant was the editor and proprietor of the New-York Herald, as the history of the trial showed that both parties did—it did not show any employment of the plaintiff by the defendant to render the services he claimed to have rendered; and that the justice correctly decided the case upon the evidence.

The rule which requires witnesses to testify to facts from knowledge, and not from belief, justified the decision of the justice in excluding the question put to the witness Doyle, to wit: "From that printed copy, can you state whose reports they were?" There are exceptions to this rule. On questions of skill and judgment, men of science and experience are allowed to give their opinion in evidence. (23 *Wend.* 425.) But this does not come within any exceptions to the rule.

In relation to the point that the justice erred in excluding the evidence as to the declarations of the foreman in the defendant's establishment—*held*, that it was necessary that it should have appeared in evidence that he was the agent of the defendant, transacting business for him, and that such declarations were made in relation to that business, and while engaged in it. There being no such evidence, the evidence offered was properly excluded.

Not reported.

Coggill *agt.* Leavitt.

COGGILL, plaintiff in error, *agt.* LEAVITT, President of the American Exchange Bank, defendant in error.

Questions discussed.

1. Whether the *acceptor* of a draft, after having paid it to an innocent holder, can recover back the amount, on ascertaining that *the name of the payee*, who had no interest in it, was a *forgery*?

2. Whether, though the payee had no interest in the draft, yet being a real person, his endorsement was essential to pass the bill?

This was an action of assumpsit, tried at the Oneida Circuit, on the 19th day of April, 1844, before his honor PHIL0 GRIDLEY, Circuit Judge.

On the trial of the cause it was proved and admitted that David Leavitt is president and John I. Fisk cashier of the American Exchange Bank, an association under the act to regulate the business of banking, situate and transacting business in the city of New-York, and that said association, at the date of the cause of action, was duly organized under said act.

The counsel for the plaintiff proved and read in evidence a bill of exchange in the words following, viz. :

\$1,500.

Earlville, July 28th, 1843.

Ten days after sight please pay to the order of Truman Billings fifteen hundred dollars for value received, and charge the same to the account of

Your ob't servants,

SHAPLEY & BILLINGS.

To HENRY COGGILL, New-York, No. 90 Pearl-street.

Purporting to be endorsed, "Pay T. O. Grannis, cashier, or order, Truman Billings, Truman Billings, Jr., pay to John J. Fisk, cashier, or order. T. O. GRANNIS, Cashier."

The plaintiff then proved by Truman Billings that he never endorsed the draft himself, nor authorized any one else to endorse it in his behalf; and that the endorsement of the name of Truman Billings, Jr., was not in the handwriting of his son, Truman Billings, Jr. Had no knowledge of the existence of this bill of exchange until after his son, Charles S. Billings, of the firm of Shapley & Billings, had absconded, and never had

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any interest in it. The drawer's signature was in the handwriting of Charles S. Billings.

Plaintiff also proved that, neither at the time of the acceptance nor at any time since did the plaintiff have any funds of Shapley & Billings, and was not indebted to them; that it was an accommodation acceptance, and paid by plaintiff at maturity at the American Exchange Bank.

Plaintiff then proved by David A. Shapley that he was the late partner of Charles S. Billings, and that he never saw the draft before it was accepted and paid. It was drawn and signed in the handwriting of Charles S. Billings. The proceeds of the draft never came to the benefit of the firm of Shapley & Billings. Plaintiff did not owe the firm any thing at the time this draft was drawn. The plaintiff introduced in evidence letters showing his demand upon the American Exchange Bank for repayment of the draft, and the answer of the Bank of Central New-York.

The defendant proved, by Timothy O. Grannis, cashier of the Bank of Central New-York, that on the 29th of July, 1843, this draft was presented by Charles S. Billings, in behalf of the firm of Shapley & Billings, for discount, and was discounted by the bank, and the money paid to Charles S. Billings. Had no knowledge or suspicion that the endorsements were forgeries. The bank had before discounted similar drafts, one or two with similar endorsements of these names, which had been accepted and paid by the plaintiff. That this draft was transmitted by the witness to the American Exchange Bank for collection, soon after it was discounted. He was advised of its payment on the 12th of August, 1843, by due course of mail. That Billings left the country about the time of the maturity of this draft. Charles S. Billings informed him that he, Billings, was purchasing wool for the plaintiff, and wanted the money to pay for it.



His honor, the circuit judge, charged the jury that the plaintiff was not entitled to recover, and that the defendant was entitled to their verdict. The plaintiff excepted. The jury found a verdict for the defendant.

The supreme court, in October term, 1845, affirmed the judg-

ment on the argument. No written opinion was delivered. The plaintiff, on error, removed the judgment to this court.

A. W. Bradford, Attorney and

John Van Buren and B. Davis Noxon, Counsel, for plaintiff
in error.

 *Van Buren.*—Only question is, whether plaintiff could have been compelled to pay *after acceptance*. We say not. Then paid under a mistake of fact, and can recover the money back. (1 *T. R.* 654; 1 *Camp.* 130.) Can not recover on the ground that it is payable to a fictitious person. *Story on Bills*, §§ 263, 264, was such a man, though he had no interest in the bill. 

The plaintiff being the acceptor of a bill of exchange for \$1,500, drawn on him by one of the firm of Shapley and Billings, in the name of the firm, payable to the order of Truman Billings, and discounted by the Bank of Central New-York, having paid the same to the defendant, was entitled to recover back the amount; and the charge of the circuit judge to the contrary was erroneous:

First. Because the endorsement of the name of the payee was forged, the defendant had no title to the bill, and the payment was made without any consideration and under a mistake of fact. (*Canal Bank v. Bank of Albany*, 1 *Hill*, 289; *Talbot v. Bank of Rochester*, *id.* 295; 6 *Barn. & Cres.* 671; 9 *id.* 902; 9 *D. & R.* 731; 3 *B. & C.* 428; 5 *D. & R.* 403; 4 *Man. & Ry.* 676; *Ch. on Bills*, 430, 198, 265; 4 *T. R.* 28; 1 *H. Bl.* 607; 1 *Car. & Payne*, 197; *Ld. Ray.* 738; *Burr*, 452, 1516; *Douglass*, 633.)

Second. The written contract with Shapley & Billings and with the bank was to pay to the order of Truman Billings, and there is no rule preventing an accommodation acceptor, or other surety, from insisting on the letter of his contract.

Third. If it be said that the plaintiff intended to give credit to the drawers, the same may be said also of the bank, and in this respect the bank has no superior equity over the acceptor.

Fourth. Had the plaintiff refused to pay the bill, the defend-


ant could not have compelled him, being unable to make title through a forgery. The plaintiff is entitled to be reinstated in his former position, unless he is the party most in fault.

Fifth. But the acceptance of the bill was no admission of the genuineness of the endorsements; the bank discounted it before it was accepted, and solely on the credit of the drawers and endorsers. The bank was in no way misled by the plaintiff, and the plaintiff is therefore an innocent party. (7 *Tawn.* 455; *T. R.* 654; *Camp.* 101; 1 *Hill*, 289, and cases cited.)

Sixth. The bank, however, was in fault. Being the party next to the payee, they were bound to inquire as to the endorsement. Had the proper inquiries been made, the fraud would not have been successful. By endorsing the bill, the bank guaranteed the genuineness of the previous endorsements, gave credit to them with the plaintiff, and thus led him to make payment on the faith of those representations. The bank should not be permitted to take advantage of its own wrong. (*Herrick v. Whitney*, 15 *John.* 240; *Ch. on Bills*, 266; 2 *T. R.* 70; 8 *Mass.* 409; 9 *id.* 408.)

Seventh. But the plaintiff did not intend to give an unconditional credit to the drawers. If he had known of the forgery, it is evident he would not have accepted the draft. The instructions given in relation to its acceptance show that he looked in some measure to the mode of its negotiation, and the character of the endorsers. The endorsement and discounting by the bank, therefore, were material inducements to the acceptance and payment of the bill.

Eighth. Though the payee had no interest in the draft, yet being a real person, his endorsement was essential to pass the bill. Bills payable to the order of a fictitious person, when the acceptor is not cognizant of the fact, are void. (1 *Camp.* 130, note and cases there cited; also note b., p. 180; *Peake's additional cases*, p. 146; 6 *Bro. P. C.* 255; 10 *Bar. & Cres.* 468.)

 (19 *Pick.* 99; 2 *N. H.* 446, note; 5 *Greenl.* 302.) Fraud of one partner don't bind the firm. (6 *Mass.* 242; *Coll. on Part.* 251; 5 *H.* 160; 21 *W.* 502.) Paying without funds, could recover from drawers. But here we could not recover against drawers, because we did not pay, as they requested, to

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the order of T. B. (*Add. Cas.* 106; 11 *Louisa.* 573; 6 *B. & C.* 671; 3 *id.* 428; 8 *Mass.* 408; 1 *C. & P.* 197.)

Ninth. The plaintiff being innocent, and the bank being in fault, the bank should derive no benefit from its own negligence, by retaining money paid under a mistake of fact, induced by its own representations.

Tenth. To establish the principle that the endorsement of an accommodation bill by the payee is not essential to its negotiability, must be a serious inroad upon the law relating to bills of exchange, and injuriously affect the safety and certainty of commercial transactions.

A. W. BRADFORD, *Attorney for plaintiff in error.*

B. D. NOXON and JOHN VAN BUREN, *of Counsel.*

Noxon, same side, cited: *Bay. on Bills*, 1, 84, 184; 3 *W.* 412; 9 *Mass.* 408; *Chitty Bills*, 458-9 463-4, 286; 4 *Cowp.* 565; 6 *Taunt.* 76; *D. & R.* 324; 10 *Wheat.* 607, 425, 628, 336; *Bay. Bills*, 487, *ed.* '36; 2 *Camp.* 17; 2 *N. H.* 446; 1 *H. Bl.* 607; *Doug.* 638; 3 *Barr.* 1354; 17 *Mass.* 33.

B. D. Noxon, in reply.—Money was paid under a mistake of fact, and is a general principle that money so paid may be recovered back. No negligence. Not bound to know handwriting of endorsers. (3 *W.* 412.)

Spencer & Kernan, Attorneys and

Joshua A. Spencer, Counsel for defendants in error.

First. Shapley & Billings, the drawers, the bank of Central New-York, and Henry Coggill, the acceptor, are the only parties who ever had any interest in the bill of exchange.

Truman Billings, the payee, never had any interest in it. Not having any title to it, no endorsement by him was necessary to pass the title of Shapley & Billings to the bank. By their delivery the bank became the owner of the bill, having the right to present it for acceptance and payment, and to receive the money upon it. (*Chitty on Bills*, 220, *ninth Amer. from the eighth London edition*; *Titcomb v. Thomas*, 5 *Greenl. Rep.* 282; *Chitty on Bills*, same *ed.* 178; *Myers v. James*, 2 *Bail. Rep.* 547; *id.* 545; 1 *Cow. Tr.* 169; 13 *Mass.* 304.


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Second. As between the drawers and acceptor, the bill is to be regarded as payable to the drawers' order, or to the order of a fictitious payee, or to the order of the cashier of the Bank of Central New-York. (*Plets v. Johnson*, 3 *Hill*, 112.)

Third. The acceptor has no interest in the endorsements and no remedy upon it. He stands as the maker of a note. The bank alone was interested in having genuine endorsers. (*Ch. on Bills*, same ed. as above, 267; *Griffith et al. v. Rudd et al.*, 21 *Wend.* 502; *Suydam et al. v. Westfall et al.*, 4 *Hill*, 211, 217.)


Fourth. Truman Billings has no claim against the acceptor for the money upon this bill. (1 *Hill*, 287.)

The reason why an acceptor who has paid the money upon the faith of a forged endorsement can recover it back is, that the payee has never parted with his interest in the bill, and the acceptor is still liable to him for its payment. Here all the interest in the bill was transferred to the bank by its delivery; and while thus owned and held, Coggill accepted and paid it at the request of the drawers, to whom alone he could ever look for reimbursement, if the funds were not already in his hands.

 Truman Billings, the payee, never had any interest in the bill—did not know of its existence.

Shapley & Billings owned it, and had the right to negotiate it, as they did, to the Bank of Central New-York.

After acceptance, bank might have sued, either in its own name, or in the name of S. & B., or in the name of Truman Billings.

But no matter how they could sue, for they had no occasion, as the draft was paid by the drawee. Passed by delivery. (Same as though payable to bearer.) 

SPENCER & KERNAN, *Attorneys for defendant in error.*

J. A. SPENCER, *of Counsel.*

DECISION.—Judgment affirmed, unanimously.

NOTE.—*Held*, that Truman Billings, the payee, never was the owner of the draft; nor was it drawn with the intent that he should either endorse it or have any interest or concern with it; consequently, he could not maintain an action upon it for his own benefit against any one, and having no title, could in no event have a legal claim to the money.

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Not analogous to the case where the payee is *the owner* of the bill and could maintain an action upon it, both against the acceptors and drawers.

Shapley & Billings having drawn the draft and passed it to the bank with the name of the payee endorsed upon it, by that act affirmed that the endorsement was genuine, so that the bill might *pass by delivery*; and would be estopped from controverting the genuineness of the endorsements, in a suit against them by the bank.

Reported, 1 Comstock, 113.

DOUGHTY, plaintiff in error, *agt.* HOPE, defendant in error.

Questions discussed.

1. Whether the *report* of the *Assessors* of Estimate and Assessment for regulating and improving streets in the city of New-York, after being *confirmed by the common council*, is so *final and conclusive*, under the statute, as to preclude any inquiry into it, for error or irregularity?

2. Where the *prima facie* presumption was that *all* three of the assessors met and consulted, although only *two* of them signed the estimate and assessment, whether the defendant was at liberty to rebut that presumption by showing that, in point of *fact*, the third assessor did nothing beyond taking the oath of office?

3. Whether the fact, that the third assessor did *not* act, could be *proved* by one who did act, as well as by the one who did not?

4. Whether the publication of the *redemption notice* required to be published six weeks, twice a week, must *end prior* to the commencement of the last six months of the two years after sale?

This was an action of ejectment tried before Hon. JOHN W. EDMONDS, Circuit Judge, on the 13th day of October, 1846, to recover corner lot No. 31, on the south side of 125th street, between 3d and 4th avenues, in the city of New-York, under a corporation sale. The plaintiff offered in evidence a duly certified copy of an ordinance passed April 26th, 1836, to set curb and gutter in 125th street between 3d and 4th avenues, and which appointed Jacob L. Warner, M. D. L. Gaines, and John Secor, assessors. (2 *Rev. Laws*, 407, § 175.)

Plaintiff then called Jacob S. Warner, who was sworn, and

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the copy of the ordinance and the following affidavit were shown to him :—

“ *City of New-York, ss.*—We whose names are hereunto subscribed, do severally swear, that we will make the estimate and assessment directed by the above ordinance fairly and impartially, according to the best of our skill and judgment.

J. S. WARNER,	} <i>Assessors.</i>
M. D. L. GAINES,	
JOHN SECOR.	

“ Sworn to by J. S. Warner, M. D. L. Gaines, and John Secor, this 28th day of January, 1837, before me,

C. W. LAWRENCE.”

The witness testified, I acted as assessor in making this assessment ; John Secor and M. D. L. Gaines were associated with me. These are their signatures to this affidavit, and we took the oath before C. W. Lawrence, then mayor. At the passage of this ordinance, I was assistant street commissioner. Gaines and Secor were also in the office. Gaines was first clerk, and Secor was second clerk. We adopted the principle which had been adopted. We were altogether in the street commissioner's office. There was a regular settled principle upon which assessments were made. Being shown an assessment roll, witness further stated, this is our assessment, and it was made according to the rule adopted in the office. This is the estimate of the whole expense. We divided it according to the work done opposite each piece of property. The intersections made more work and were charged more. Francis Nicholson acted as city surveyor. Said estimate was then read in evidence, as follows :

“ We, the subscribers, the persons appointed by the mayor, aldermen, and commonalty of the city of New-York, in common council convened, by an ordinance passed on the twenty-sixth day of April, one thousand eight hundred and thirty-six, to make an estimate of the expense of conforming to a certain order and direction of the said common council, for setting curb and gutter in 125th street, between 3d and 4th avenues,

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and a just and equitable assessment thereof among the owners or occupants of all the houses and lots intended to be benefited thereby, in proportion as nearly as may be to the advantage which each shall be deemed to acquire, having taken the oath required by law, which is filed in the street commissioner's office, do hereby certify to the said mayor, aldermen, and commonality, in common council convened, that we have, according to law, estimated the expense of conforming to the aforesaid order and direction of the common council, for setting curb and gutter in 125th street, between 3d and 4th avenues, at the sum of two thousand eight hundred and eighty-nine dollars and forty-eight cents, as follows, that is to say :

Contract,	.	.	.	\$2795.54
Surveying,	.	.	.	65.98
Advertising,	.	.	.	3.00
Collecting,	.	.	.	24.96

\$2889.48''

The assessment and assessment map were also read in evidence, and the lot described in the plaintiff's declaration is there assessed to Isaac Adriance by lot No. 31, on said map, for setting curb and gutter on 125th street, from 3d to 4th avenue, for \$150.83, to which estimate, map and assessment, is attached a return by the assessors named in said ordinance, bearing date September, 1837, signed Francis Nicholson, surveyor, and Jacob S. Warner and M. D. L. Gaines, assessors. The witness further testified that the measurements on said assessment were made by the city surveyor. The figures of amounts of assessments are made by a clerk in the office. I can't tell in whose handwriting they are, they may be Mr. Gaines's. Lot No. 31, and the intersection, are assessed to Isaac Adriance. Lot 31 is assessed \$139.74, the intersection is assessed \$11.09. Lot 31 extends 90 feet on 125th street, and the intersection extends 115 feet 2 $\frac{1}{4}$ inches. Lot 31 is a corner lot.

Cross-examined. Question. When did you first see this assessment? This question and all questions tending to show by this witness that either of the assessors did not act with the

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others, or the mode of making up the assessment, was objected to by the plaintiff's counsel ; which objection was overruled by the judge, and the plaintiff's counsel excepted. The witness testified, if my name had not been signed to this assessment I should not have known that I ever saw it before, there are so many papers of this kind. Assessments have been brought to my house to be signed since I left the street commissioner's office. I can't say who fixed the principle. I found it fixed when I went into the office. We assessed a lot of 100 feet front the same, whether it was two inches or 100 feet deep. I have no recollection of having a meeting. We made no estimate of expense. The way was, that a contract was made and executed, and the amount reported to us, and we assessed it. The assessment was made in the street commissioner's office, by some one, and this by the assessors was merely nominal. They signed it after it was made out by some one in the office, without any particular examination by the assessors, when it was signed, or at any time. Witness was in the office three years prior to 1836, and was first appointed an assessor in 1834. The estimate was decided by the street committee. The way we came appointed was, there is a standing ordinance saying, that the street commissioner, assistant street commissioner, and first clerk, should be the assessors, and I was, at the time of the ordinance, acting street commissioner. I am speaking of assessments generally ; I do not recollect this particular one, nor anything about this. I cannot say that Secor ever met with us, nor can I say that I ever met with any one in relation to this particular assessment. I don't recollect whether I met with any one or not. We did not go on the ground and make an assessment in this case, and I never knew of any assessment made on the ground in which we acted as assessors. The work must have been completed before any assessment could be made. The assessments for curb and gutter were made in the street commissioner's office, and our acting as assessors was merely nominal ; the surveyor made the measurements. I cannot say but that I signed this assessment since I left the street commissioner's office, but I do not recollect that I did. We signed assessments in the office wherever we happened to be. I do

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not know that any sectional assessment was made. The expenses of assessment are correctly stated in the estimate; there was no charge made for our fees. The common council appointed the assessors from the street commissioner's office, so that no charge should be made. To all this cross examination the plaintiff did in due time except.

Direct examination resumed.—The assessment bears date September, 1837. I was in the street commissioner's office three years before the passage of the ordinance for the assessment, and remained there till 1839. I was first appointed an assessor in 1834. Gaines and Secor were first appointed assessors with me in 1835. We all understood the principle of making assessments; we all adopted it; the principle was very simple, and did not require much consultation. The work was done at a fair price at the time; it would be a high price now. The practice was for the street committee to advertise for sealed proposals, and to give the contract to whoever offered the best terms. I was in the office acting as street commissioner at the date of the ordinance for this assessment for about three months. The common council by a general ordinance directed the street commissioner and clerks in the office to act as assessors; and I was named first in the ordinance for this assessment, because I was then the acting street commissioner. When I say the amounts were filled in by clerks, I mean clerks in the street commissioner's office, and assessors also. The ordinances always directed the work to be done under the direction of a city surveyor. I can't say that I did not have this assessment under my charge; I may have done so. I don't recollect anything about it.

Cross-examined.—I can't say that in this particular case we had any formal meeting. I do not recollect.

Question.—Is it not your impression that you never did?

This question was objected to by the plaintiff's counsel, which objection was overruled, and the plaintiff's counsel excepted.

Answer.—Founded on the custom of the office, my impression is that we did not. I don't know who made the contract; I may have made it myself; I have no recollection about it.

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The plaintiff then offered in evidence a certified copy of the proceedings of the common council, whereby the assessment was confirmed on the 4th day of April, 1838, and C. S. Van Winkle appointed collector. The defendant objected to this evidence, on the ground that it did not appear that the proceedings were confirmed by calling the ayes and noes, or that they had been signed by the mayor, and that the proceedings were only a confirmation of the assessment, and not of any estimate, as the law requires. The objection was overruled and excepted to, and the evidence allowed.

The collector's warrant, issued by the mayor and four aldermen, and a list of delinquents returned by the collector, were then proved, and the oath of the collector that he had called upon the persons named in his list, (and among others, Isaac Adriance, to whom the property in question was assessed,) and their neglect and refusal to pay.

It was admitted that the lot was sold on the 20th June, 1840. The plaintiff's counsel then read in evidence the *lease* duly recorded, from the mayor, aldermen, and commonalty of the city of New-York, to the plaintiff for the term of 800 years, in which was recited the *certificate* given by the street commissioner to Doughty, the purchaser. (*Laws of 1841*, §§ 5 and 7.)

A *sale notice* was proved to have been published in the New Era, a newspaper published in the city of New-York, for fourteen weeks successively, commencing on the 14th day of March, 1840. Also a like notice published thirteen weeks successively, commencing March 12th, 1840. (*Act 1816, and Laws 1840*, 274, § 10.)

A *redemption notice* was then proved to have been published in the Evening Post, commencing on the 13th day of December, 1841, and was continued twice in each week successively. The last publication was made January 21, 1842. This notice the defendant's counsel objected to, on the ground that it should have been published for six weeks, that should end previous to the commencement of the last six months, before the expiration of two years after the sale of the property. The judge reserved the question and received the testimony.

A *notice to redeem* was then proved to have been served by

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Leatham Teaz upon Isaac Adriance, (the owner,) on the 6th of December, 1842, and another on Thomas Hope, (the tenant,) on the 9th December, 1842.

The street commissioner's *certificate*, that the premises had not been redeemed on the 31st July, 1843, was then proved.

The counsel for the plaintiff requested the judge to charge the jury as matter of law, that the confirmation of the report of estimate and assessment in this case by the common council was binding and conclusive on the owner and occupant of the premises in question and a lien and charge thereon, and it was wholly unimportant to inquire whether any irregularities had occurred in the proceedings of the assessors in making said estimate and assessment, or whether any error had taken place in the proceedings thus confirmed.

The judge refused so to charge, and the counsel for the plaintiff excepted.

The counsel for the plaintiff requested the judge to charge the jury that it appearing in evidence that the assessors had all taken the oath and had fixed upon, or adopted the principle of making such assessment, and were all in the street commissioner's office when the assessment was made, though only two had signed the report of the assessors; it was to be presumed that Secor, who did not sign the report, met and consulted with those who did sign the report, and that such presumption could not be rebutted by any impression or non-recollection of the witness Warner, as it respects himself or any of his co-assessors.

The judge stated that he should charge that the legal presumption was that the assessors had done their duty; but refused to charge as requested in other respects. The counsel for the plaintiff again excepted.

The counsel for the plaintiff then requested the judge to charge the jury, that Warner and Gaines having signed the report was conclusive evidence that they had acted as assessors, and that Secor alone could prove that he had not met, consulted and acted with the others, and as his absence was unaccounted for, no secondary evidence could go to the jury.

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The judge refused so to charge, and the plaintiff's counsel excepted.

The counsel for the plaintiff requested the judge to charge the jury, that the twenty-first section of the amended city charter, requiring the executive business of the corporation to be performed by distinct departments, and requiring the common council to organize and appoint such departments, was a modification of § 175 of the laws of 1813; and if the assessment and estimate had been made under the direction of the street commissioner, the same was well and legally made, and could not now be impeached.

The judge refused so to charge, and the counsel for the plaintiff again excepted.

The counsel for the plaintiff again requested the judge to charge the jury, that the redemption notice was sufficiently published, that the law of 1816 as amended by the law of 1840 was sufficiently complied with by six weeks' publication in a daily newspaper in the city of New-York, successively, twice in each week, provided such publication ended any time before the expiration of two years from the time of the sale of the premises.

The judge refused so to charge, and the plaintiff's counsel excepted.

The counsel for the plaintiff again requested the judge to charge the jury, that the publication of said redemption notice having commenced on the 13th December, 1841, and previous to the last six months of the two years after the sale of the premises, the statute was sufficiently complied with.

The judge refused so to charge, and the plaintiff's counsel excepted.

The counsel for the plaintiff again requested the judge to charge the jury that the statutes of 1816 and 1840 were directory.

The judge refused so to charge, and the plaintiff's counsel excepted.

The counsel for the plaintiff again requested the judge to charge the jury that upon the giving of the street commissioner's certificate, pursuant to the act of 1841, the lease to the

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plaintiff became absolute, and the defendant and all others interested in the premises, were debarred from all right and title thereto, during the term of years for which the premises were conveyed to the plaintiff, and that, therefore, the defendant could not avail himself of any defect in the publication of the redemption notice.

The judge refused so to charge, and the counsel for the plaintiff again excepted.

The counsel for the plaintiff requested the judge to charge the jury that the lease was, by the act of 1816, conclusive evidence of the regularity of the sale; and therefore the defendant could not avail himself of any defect in the publication of the redemption notice.

The judge refused so to charge, and the counsel for the plaintiff again excepted.

The judge charged the jury, that the first question for them to pass upon was,—Was the action of the assessors in making the estimate of the expense, and assessment thereof, correct or not. The common council must obey the act of the legislature strictly. The assessors were to divide the amount of the expense, and assess the same as each was benefited. The question is, Has this assessment been made in that way?

The evidence is, that an assessment has been made. If the assessors passed upon it, then the proceeding is right. But if they have not passed upon it, then the proceeding is wrong. If they have found how much each was benefited, then their assessment is right; if they have not, the assessment is wrong.

I therefore charge, that the confirmation by the common council of the report of the assessors is not so final and conclusive as to preclude the defendant from inquiring into the report; therefore, it is here a question: 1st. Was there a proper estimate of expense? 2d. Was there a proper assessment of it among the owners benefited?

An assessment and estimate to be right, must be made by the three appointed by the ordinance; two may report if three act. The presumption is, that all three did act; but the testimony of Warner is uncontradicted, and you must pass upon that alone, and if you are satisfied that one of the assessors

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had nothing to do with the estimate and assessment, then the assessors did not act. An estimate should be made beforehand, and involves an exercise of judgment. Did the assessors ever meet and agree upon the principles of the assessment? If they met and so agreed, the time when done is immaterial.

As to the redemption notice, it must be published for six weeks, twice a week, and which publication must end prior to the commencement of the last six months of the two years after the sale. If the jury think that it has not been so published, their verdict must be for the defendant. This involves, of course, the instruction that the certificate of the street commissioner which renders the sale absolute is not conclusive evidence of the regularity of the redemption notice.

To all, each, and every part of which charge the plaintiff's counsel then and there excepted.

The jury found a verdict for the defendant.

The supreme court (BRONSON, J., delivering the opinion) affirmed the judgment rendered at the circuit. *Reported 3 Denio, 598.*

A. Thompson, Attorney and Counsel for plaintiff in error.

First. The circuit judge erred in refusing to charge the jury as matter of law, that the confirmation of the report of estimate and assessment in this case by the common council was binding and conclusive on the owner and occupant of the premises in question, and a lien and charge thereon; and it was wholly immaterial to inquire whether any irregularities had occurred in the proceedings of the assessors in making said estimate and assessment; or whether any error had taken place in the proceedings thus confirmed; and the judge also erred in charging the jury, that the first question for them to pass upon was, was the action of the assessors in making the estimate of the expenses, and assessment thereof, correct or not; and also in charging, that the confirmation by the common council of the report of the assessors is not so final and conclusive as to preclude the defendant from inquiring into the report. The supreme court also erred in sanctioning such refusal

and charge of the circuit judge. (*Error Book*, p. 24, p. 26, pp. 30-32.)

Because—

1. The statute declares that such estimate and assessment being ratified by the common council, shall be binding and conclusive upon the owners and occupants of such lots, and a lien and charge on such lots, &c. (2 *Rev. Laws*, p. 407, § 175.)

2. The request was in accordance with the decisions of the court of errors in similar cases. In opening streets three commissioners are to be appointed by the supreme court; the commissioners are to report to the supreme court, and such report, when confirmed by the supreme court, shall be final and conclusive. These powers conferred upon the supreme court are held, in 7 *Hill*, 19, to be judicial, from their nature; and this is confirmed in the court of errors. The 175th and 178th sections are in *pari materia*. The same words must have equal force, whether in the one or the other section. The confirmation of the supreme court is conclusive by force of the statute; and in like manner the ratification of the common council is final and conclusive by force of the statute; and each and every consequence that follows in the one case by statute, also follows in the other. (2 *Rev. Laws*, 409, § 178; 2 *Rev. Laws*, p. 413; 7 *Hill*, 19; 2 *Denio*, 332.)

Second. The common council's jurisdiction was sufficiently proved by the passage of the ordinance to set curb and gutter. Having acquired jurisdiction, their confirmation was a final and conclusive statutory judgment, which could not be reviewed in any collateral action; and as objections could have been made to the confirmation of the report, a *certiorari* would not lie. (7th and 8th p.; 2 *Rev. Laws*, p. 407, § 175; 2 *Hill*, 20; 4 *Hill*, 89; 17 *Johns.* 468; 7 *Wend.* 83; 2 *Hill*, 27.)

Third. The great difference between the supreme court and the plaintiff in this case is as to the effect of the ratification of the common council. The supreme court holds the whole proceedings of the common council, the carrying out a statute power; we hold that the passage of the ordinance to do the work gives the common council jurisdiction; and the ratification of the assessors' report is as truly a statutory judgment as

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the confirmation of a report of the supreme court; and consequently, such ratification is in reality final and conclusive upon the defendant, (the occupant,) and cannot be reviewed in this action for error or irregularity. (2 *R. L. p.* 460, § 315; (135, and *R.* 208;) 2 *Denio*, 332; 2 *Hill*, 27; 17 *Johns.* 468; 7 *Wendell*, 83.)

Fourth. The judge erred also in receiving the testimony of Warner, for the purpose of showing that either of the assessors did not act with the others, or the mode of making up the assessment. Secor should have been called, or his absence accounted for. (10th page; 21 *Wend.* 178; 3 *East*, 192; 2 *R. S.* 581-2, *misdemeanor.*)

The judge also erred in refusing to charge, that it appearing in evidence that the assessors had all taken the oath, and had fixed upon or adopted the principle when the assessment was made, though only two had signed the report of the assessors, it was to be presumed that Secor, who did not sign the report, met and consulted with those who did sign the report, and that such presumption could not be rebutted by any impression or non-recollection of the witness Warner, as it respects himself or any of his co-assessors. The supreme court have mistaken the testimony. (24th page; 7 *Cowen*, 556, *see note*; 21 *Wend.* 211; 23 *Wend.* 327; 2 *R. S.* 555, § 27; 17 *Johns.* 468; 9 *Wend.* 17; 21 *Wend.* 183; 8th, 11th, and 30th pages.)

The judge also erred in refusing to charge, that Warner and Gaines having signed the report, was conclusive evidence that they had acted as assessors, and that Secor alone could prove that he had not met, consulted or acted with the others, and as his absence was unaccounted for, no secondary evidence could go to the jury. (21 *Wend.* 184, 185; 3 *East*, 192.)

The judge also erred in charging the jury, that the testimony of Warner was uncontradicted, and they must pass upon that alone; and if they were satisfied that one of the assessors had nothing to do with the estimate and assessment, then the assessors did not act. (26th page; 1 *Term Rep.* 300; 4 *Burr*, 2224; 1 *W. Bla.* 366; 1 *Dick.* 389.)

Fifth. The judge erred in charging, that the redemption notice must be published for six weeks, twice a week, and which

publication must end prior to the commencement of the last six months of the two years after the sale. (26th page ; 2 *R. L.* p. 442, § 259 ; *L. of* 1816, p. 114, § 2 ; *L. of* 1840, p. 274, § 10.)

The judge also erred in refusing to charge, that the publication of said redemption notice having commenced on the 13th December, 1841, and previous to the last six months of the two years after the sale of the premises, the statute was sufficiently complied with. (25th page ; 1 *R. S.* 2d ed. p. 399, §§ 76–80 ; *L. of* 1823, pp. 405, 406, § 43 ; 10 *Wend.* 397 ; 9 *D. and R.* 772 ; 3 *Clark and Fin.* 354.)

The judge also erred in refusing to charge, that the statutes of 1816 and 1840 were directory. (25th page ; 7 *Wend.* 83, and cases cited ; 6 *Hill*, 646 ; 1 *Burr*, 447 ; 1 *Burr*, 330 ; 5 *Cow.* 469 ; 2 *Mass.* 230 ; *Dwarris on Stat.* 713–716 ; 2 *Binney*, 227 ; 11 *Wend.* 604 ; 2 *Denio*, 160 ; 17 *Johns.* 167.)

The case of 18 *Johns*, 441, is provided for by laws of 1816, pp. 12 and 13.

Sixth. The judge also erred in refusing to charge, that upon the giving of the street commissioner's certificate, pursuant to the act of 1841, the lease to the plaintiff became absolute, and the defendant, and all others interested in the premises, were debarred from all right and title thereto, during the term of years for which the premises were conveyed to the plaintiff; and that therefore the defendant could not avail himself of any defect in the redemption notice. (25th page ; 1 *R. S.* 400, 2d ed. § 84–90 ; *Laws of* 1841, p. 211, § 7.)

Seventh. The supreme court erred in confirming all the proceedings at the trial, and refusing a new trial.

3 *Denio*, 167—Statute says, shall be *final and conclusive*—that distinguishes from authorities on which court relied—Differs from Brooklyn and Williamsburgh charters.

REPLY. First, jurisdiction—then statute—judgment as to all intermediate matters conclusive—those things must be done, but confirmation conclusive—4 *Hill* right—but not applied to New-York.

Richard Mott, Attorney and Counsel for defendant in error.

The evidence in the case shows, that three persons were ap-

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pointed by the common council to make an estimate of the expense of the improvement, and to assess the same among the owners, &c.

The evidence of Warner shows, that no *estimate* whatever of the expense was ever made by the assessors, or any or either of them.

That the assessors never had any meeting, nor were they ever together for the purpose of making a distribution or assessment of the expense among the owners or occupants of the houses and lots benefited by the improvement.

That the whole was done by a surveyor and a clerk in the street commissioner's office.

That only two of the assessors signed the assessment, and that without ever examining it.

The evidence also is, that the sale was on the 20th day of June, 1840, and the first publication of the redemption notice required by the statute of 1816, p. 114, § 2, and the statute of 1840, p. 274, § 10, was on the 13th day of December, 1841, and the last was on the 21st day of January, 1842.

First. The statute of 1813 (2 R. Laws; 407, § 175) requires the assessors to make an *estimate* of the probable costs and expense of the improvement, directed by the ordinance of the common council, before the contract is made or the work done; and that to be confirmed by the common council. And not being done in this matter, the assessment, and all subsequent proceedings, are void. (*Elmendorf v. The Mayor, &c.*, 25 Wend. 696.)

Second. The assessment and all subsequent proceedings are void, for the reason that the assessment was not made by the *three* assessors. And also, that the assessors had never met or conferred together upon the subject. (2 R. S. 555, § 27; *Ex parte Rogers*, 7 Cowen, 526; *Babcock v. Lamb*, 1 Cowen, 238; *Crocker v. Crane*, 21 Wend. 211.)

The contract was made by the *street committee*, and that amount was distributed among the owners of the adjoining property by a clerk in the street commissioner's office without consulting the assessors, and the confirmation of the report did

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not preclude the defendant from going behind it. (1 *East*, 70, 71; 4 *Hill*, 599.)

Third. The redemption notice was not published according to the statutes, the sale being on the 20th day of June, 1840. The first publication should have been on or before the 7th day of November, 1841, and to continue once a week for six weeks successively. This would have brought the whole publication within the first eighteen months, as the statutes require. The statute of 1816, (114, § 2,) and the statute of 1840, (274, § 10,) declare that the "mayor, aldermen, and commonalty of the city of New-York, *shall*, at least six months before the expiration of two years after any such sale, *cause* an advertisement to be published in one daily newspaper, printed and published in the city of New-York, at *least* twice in each week for six weeks successively." The last six months of the two years after the sale in this case commenced on the 20th day of December, 1841, and the first publication of the redemption notice being on the 13th day of December, 1841, it was published only seven days previous to the commencement of the six months before the expiration of two years after the sale, instead of forty-two days, as it should have been; (1 *Wend.* 90;) and for this reason the plaintiff's title failed. (*Striker v. Kelley*, 7 *Hill*, 1.)

Fourth. The above statutes are in derogation of common right, and should be construed strictly. (7 *Wheat.* 119; 7 *Wend.* 151; 4 *Hill*, 86; 7 *id.* 1; 13 *Serg. & Rawl.* 208; 2 *Hammond*, 231; *id.* 365; *Striker v. Kelley*, 2 *Denio*, 330.)

Fifth. The circuit judge was right in his direction to the jury, and the questions of fact were fairly submitted to the jury, and they having passed upon those facts in favor of the defendant, their verdict is conclusive.

Sixth. The lease of the corporation to the plaintiff is void for the above reasons, and conveys no title to the premises in question to the plaintiff.

R. MOTT, *Attorney and Counsel for Defendant.*

DECISION.—Judgment affirmed, adopting the opinion of the supreme court as reported 3 *Denio*, 598.

GARDINER, J., dissenting.

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NOTE.—*Held*, that under the statute (2 R. L. 407, § 175) it is not the *ratification* by the common council which is binding and conclusive, but the *estimate* and *assessment* when ratified. And it is only when an assessment has been *first duly made*, that the common council has the *power of ratification*. *Void* things are as *no* things.

But if that act was good so far as it goes, it would only be one of several necessary links in the plaintiff's claims of title, and it is a well-established rule in relation to these statute powers to transfer the title to land without the consent of the owner, that the authority must be strictly pursued from beginning to end; if any material link in the chain be wanting, the whole proceeding will fall to the ground.

The *prima facie* presumption in this case was, that all of the assessors met and consulted, although only two of them signed the estimate and assessment. But the defendant was at liberty to rebut that presumption by showing that in point of fact the third assessor did nothing beyond taking the oath of office.

And the fact that the third assessor did not act might as well be *proved* by one who did act as by one who did not.

The jury having found that only two of the assessors acted, and that the third was not consulted, and there being nothing to obviate this difficulty, it is fatal to the proceedings.

The *ratification* by the common council has not the force of a *judgment* of a court of record.

Also, *held*, that the circuit judge was right in holding that the six weeks' publication (redemption notice) should have been completed *before* the commencement of the last six months of the two years after the sale, which is allowed for redeeming.

Reported 1 Comstock, 79.

CAFFE, plaintiff in error, *agt.* BERTRAND, defendant in error.

Questions discussed.

1. Whether the rule of damages, in an action of trover, is the value of the goods at the time and place of conversion?

2. Where there is conflicting testimony upon the subject of damages in such an action, whether the rule of damages is a question of law, not to be submitted to the jury?

This was an action of trover, tried in the New-York common pleas, in September, 1843. Bertrand sued Caffee for a large quantity of looking-glasses.

The plaintiff proved by his sister, Mary Walden, that the

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looking-glasses were brought by the plaintiff from Mainz, Germany. She assisted in packing them, and acted as clerk for the plaintiff; knew the prices of all the glasses. The value in gross was from \$1,200 to \$1,500 of the currency of this country, but the value she meant to speak of in that country.

George Bertrand, a witness, brother of plaintiff, proved that the value of the glasses was 2,600 florins.

Leopold Haas, witness for plaintiff, proved that Caffé, the defendant, acknowledged that he had received the goods, and that he had sold them for the account of the creditors of Bertrand, and would not pay any thing to Bertrand; and exhibited a judgment of a criminal court in Europe against Bertrand, and some letters authorizing him to keep possession of the goods and to sell them for the benefit of the creditors of Bertrand. Haas, the witness, proved that Bertrand demanded the goods of Caffé and tendered and offered to pay him all charges and duties, which was declined, and the goods retained by Caffé. The invoice of the goods was also proved by this witness.

Isidore Raphael, a witness for plaintiff, proved the value of the glasses at \$1,500.

Barnabas Bates, a witness for defendant, proved that he appraised these goods, as one of the appraisers of the customs, at the market value of similar goods in New-York, at about \$600, after deducting the broken glasses.

The defendant then introduced in evidence the proceedings and judgment of a criminal court of Mainz, Germany, against the plaintiff personally.

The plaintiff introduced in evidence two original invoices or bills rendered by the original owners of the goods to plaintiff.

The court charged the jury, and after recapitulating the facts, stated to the jury, that the evidence as to the value of the goods was conflicting: that the witnesses for the plaintiff estimated it at sums varying from \$1,200 to \$1,800, while the witness called on the part of the defendant valued it in New-York at about \$600, and the court left it to the jury to decide from the testimony what was the fair market value of the glasses.

The court further charged the jury, that the proceedings, instead of being a decree or judgment in bankruptcy, appear to

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be a judgment against the plaintiff on a prosecution in a criminal court. That the proceedings appeared to be those of a court exercising criminal and not civil jurisdiction, and that although, as between a bankrupt and his assignees, where the dispute rested exclusively between them, and no rights of other persons were in any degree involved, he was of opinion, that the courts of this country would give effect to a decree of a foreign court, declaring a party to be a bankrupt, and transferring his property to assignees for the benefit of his creditors, yet that he did not view the proceedings given in evidence in that light, nor as affecting the title to the plaintiff's property in respect thereof, save the jury should be of opinion, from the evidence, that the plaintiff purchased the property fraudulently, not intending to pay for the same. That if, from the other testimony in the cause, the jury should be so inclined, that the said alleged record was evidence in respect thereof, but was not of itself evidence to establish a change or legal transfer of title. That if the jury should be of opinion, that the plaintiff had only been unfortunate in business, and was only unable to pay his debts through misfortune, without fraud, that that would not change the title to the property. But that if the jury should be satisfied that the plaintiff purchased the property fraudulently, or without intending to pay for it, that the said alleged criminal record was evidence in such view of the case, and that the jury should so view the said record, and not otherwise. And that if they should come to the conclusion that he did purchase the property fraudulently, then in such case, that the plaintiff could not recover, but otherwise, that the plaintiff was entitled to the value of the property, the fair market value.

To which part of said charge, as relating to the criminal record, the plaintiff's counsel excepted, on the ground above stated, as to the introduction of the same in evidence when offered. And further, on the ground that the same was irrelevant, and improperly admitted in evidence, by a mistake attributable to the appellative of the defendant's counsel, when offering the same in evidence, "A judgment or decree in bankruptcy," and by which plaintiff's counsel had been taken by surprise. And that when translated, and when the court had discovered that

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it was a criminal record against the person of the plaintiff, the court should, at once, have struck the same out of the evidence in the cause, as irrelevant to the issue, and should have instructed the jury to disregard the same ; and the court did thereupon note the exception of plaintiff's counsel ; and the counsel for the defendant excepted to the charge upon the following points, viz. :

1. That there was no evidence of the value of the property at the time of the alleged conversion, except that of Mr. Bates, and that the jury ought not to have been allowed to take the estimates of the plaintiff's witnesses of the value in Germany as their guide.

2. As to so much of the charge which denied any force or effect to the proceedings of the court of Mainz.

The jury found a verdict for the plaintiff for \$775 damages and six cents costs.

Whereupon, the court at general term confirmed the verdict of the jury, with costs, if the plaintiff remitted of the damages so given the surplus of the valuation of the property, to the valuation of the same as established by the testimony of the witness Barnabas Bates ; otherwise, a new trial was ordered, with costs to abide the event of the suit.

The amount remitted by the plaintiff was \$277,70, and thereupon judgment was entered for plaintiff for the residue of the damages, \$547,36, and costs, \$350,42.

The defendant thereupon brought a writ of error and removed the judgment to the supreme court, where, in July term, 1846, the judgment of the common pleas was affirmed.

BRONSON and JEWETT, J. J., for, and BEARDSLEY, J., against affirmance.

The defendant then brought a writ of error, and removed the judgment to this court.

E. H. Owen, Attorney and

F. B. Cutting, Counsel for plaintiff in error.

☞ We make here only the question of damages. ☞

First. The rule of damages in an action of trover is the value of the goods at the time and place of conversion. (*Dillenback*

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v. *Jerome et al.*, 7 Cow. 294; *Kennedy v. Strong*, 14 John. 128, 132.) And the rule of damages is a question of law, not to be submitted to the jury. (*Baker v. Wheeler*, 8 Wend. 505.)

Second. The property in question having come lawfully into the possession of the plaintiff in error, as consignee thereof, there was no conversion until in the year 1840, when the defendant in error made his demand therefor in the city of New-York. The value, at this time and place, was the only legal rule of damages.

Third. There was no witness examined, and no evidence given of the value of the property at the time and place of the alleged conversion, except that of Mr. Bates, who valued it at about \$600. The judge erred in submitting to the jury, as a guide for their verdict, the estimates of the plaintiff's witnesses, who testified only to the value in Germany.

Fourth. The attention of the court was particularly called to the point by the defendant's counsel, who excepted to this part of the charge.

Fifth. The verdict shows, that the damages found by the jury were not assessed upon the value of the goods in New-York, at the time of the conversion, viz.:



Value in New-York,	\$600,00
Charges paid by the plaintiff in error, and admitted by the defendant in error to be correct. (<i>Case, fol. 55,</i>)	251,68

Value in New-York,	348,32
The jury found a verdict for	775,00

Sixth. There was no conflict of evidence as to the value in New-York. The charge is erroneous; it misled the jury; the judgment ought to be reversed with costs.

E. H. OWEN, *Attorney for plaintiff in error.*

F. B. CUTTING, *of Counsel.*

 **REPLY.**—If exception well taken, could not be cured by entering a remittitur of damages. 

Peter Wilson, Attorney and

Azor Taber, Counsel for defendant in error.

First. The first of the two exceptions taken by the plaintiff

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in error (*fol.* 111) affords no ground for reversing the judgment.

1. Three witnesses for plaintiff below, on the trial of the issue, (*fols.* 23, 24, 30, 31, 35, and 54,) and one for the defendant below, on such trial, (*fols.* 59 and 60,) had testified to the value of the property, *without* objection, and the judge merely submitted (*fols.* 104, 105) this evidence to the jury, as it was his duty to do. To this, certainly, no exception could be taken. If the defendant desired that the judge should strike out part of this evidence, or lay down the legal rule of damages, he should have requested him to do so, and excepted if he refused. (*Law v. Merills*, 6 *Wend.* 274; *Pemrock v. Dealogue*, 2 *Pet.* 15.)


2. The exception misstates defendant's evidence, assuming it related to the value of the property at the time of the conversion, when Bates merely proved its value about five months before the conversion, (*fols.* 58 and 40, 41.) It misstates our evidence, assuming it all related to the value in Germany, when one witness proved (*fol.* 54) its value in New-York at the time of the trial. It assumes as law, that the measure of damages was the value of the property at the time mentioned by Bates, five months before the conversion, when the true legal measure is the greatest value at any time between the conversion and the time of the trial, with interest on that value. The judge was not bound to sift out of these errors of law and fact, something for the benefit of the party excepting. (*Ex parte Crane*, 5 *Pet.* 198; *West v. Wentworth*, 3 *Cow.* 82.)

And, besides, all the damages which could have resulted from this evidence is remitted, though it clearly ought not to have been.


Second. The remaining exception (*fol.* 111) is wholly unfounded. There is no such part of the charge as that excepted to. If there had been, it would, for a multitude of obvious reasons, have been good law. (1st vol. 2d part, *Star. Evidence*, 195, 6th ed., 1830.)

P. WILSON, *Attorney for defendant in error.*

AZOR TABER, *of Counsel.*

 No exception that is available. 2. We gave away

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\$50, and then defendant brings error. Just \$50 too much was deducted by writing ninety for forty. (9 *Cowen*, 32; 6 *Wend.* 274; 8 *Wend.* 109; 12 *Wend.* 504; 2 *R. S.* 618, §§ 32, 33. Double costs.) 

DECISION.—Judgment affirmed. Unanimous.

NOTE.—The principal point established in this case seems to be, that the value of foreign goods, in an action of trover, is to be ascertained by the custom-house appraisal of them here, if made near the time of conversion.

Not reported.

PLATT, plaintiff in error, *agt.* CATHELL, defendant in error.

Questions discussed.

1. Whether a *charter party* drawn J. D. C. of the first part and *M. P.*, of the city of New-York, (*agent* for J. C. and M. S., of Newbern,) of the second part, and naming the *parties* of the second part throughout the covenants, and signed and sealed "*M. P.—agent L. S.,*" is the deed of and binds *M. P.*, the agent, *personally*?

2. Where a declaration counts on a deed of charter party, *inter partes*, sealed with the seal of the defendant as party thereto, but the defendant described throughout as *agent*, and signed as agent, of which deed *profert* is made. Whether it is competent for the defendant in a plea, not traversing the execution of the deed, as alleged, to *aver* a different effect or description of party in the deed, to wit: that he was agent, and executed in that character?

This was an action of covenant brought by Cathell against Platt in the superior court of the city of New-York, in 1842. The declaration counted upon a charter party of affreightment, alleged to have been made by the defendant with the plaintiff. That the plaintiff, by the name and description of J. D. Cathell, master and agent of the schooner or vessel called the Sage of Vienna, of the burthen of 150 tons or thereabouts, register measurement, then lying in the harbor of New-York, of the first part, and Medad Platt, of the city of New-York, agent for J. C. & M. Stevenson, of Newbern, of the second part, chartered the vessel to the defendant for a voyage from Newbern, N. C., to Barbadoes and two other ports to leeward of Barbadoes; and the defendant covenanted to furnish for her a cargo of lumber,

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and to pay the freight thereon at a certain price per thousand, &c. The declaration alleged the fitness of the vessel, the actual lading of her by the defendant, and the performance of the voyage by the plaintiff, and assigned a breach of the covenants for non-payment of the freight. The defendant pleaded *non est factum* and a special plea, as follows :

And for a further plea in this behalf the said Medad Platt, by leave of the court here for this purpose, first had and obtained according to the form of the statute in such case made and provided, says that the said Jonathan D. Cathell ought not to have or maintain his aforesaid action thereof against him, because he says that the said charter party of affreightment was made and executed by James C. Stevenson and Martin Stevenson by the name and description of J. C. & M. Stevenson of Newbern, by the said Medad Platt as their agent, and that the said charter party of affreightment was executed by the said defendant in his capacity of agent, and as agent for the said James C. Stevenson and Martin Stevenson and not otherwise or in any other character or capacity whatever ; of which the said plaintiff heretofore, to wit, on the third day of December, in the year one thousand eight hundred and forty-one, and often afterward at the city and county of New-York aforesaid had notice ; and the said defendant avers that he had full and sufficient authority from the said James C. Stevenson and Martin Stevenson, and was properly and duly authorized by them to sign, seal, execute, and deliver the said charter party of affreightment as and for the act and deed of them, the said James C. and Martin Stevenson ; and that the signing, sealing, execution, and delivery of the said charter party of affreightment by this defendant as their agent for and as the act and deed of them, the said James C. Stevenson and Martin Stevenson, hath been fully ratified and confirmed by them, the said James C. Stevenson and Martin Stevenson, as and for their act and deed subsequent to the signing, sealing, execution, and delivery of the said charter party of affreightment by this defendant, as such agent as aforesaid, to wit, on the third day of December, in the year one thousand eight hundred and forty-one, and often afterward, to wit, at the city and county of New-York aforesaid,

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and this he the said defendant is ready to verify ; wherefore he prays judgment if the said plaintiff ought to have or maintain his action aforesaid thereof against him, &c.

To this plea the plaintiff demurred specially, as follows :

And the said plaintiff, according to the form of the statute in such case made and provided, states and shows to the court here the following causes of demurrer to the said second plea, that is to say, for that the said defendant was fully authorized by the said J. C. & M. Stevenson to sign, seal, execute and deliver the said charter party, yet he does not state in what manner the said authority was conveyed to him ; and also, for that although the defendant states that the said charter party was ratified by the said J. C. & M. Stevenson, yet the said defendant does not state in what manner the said charter party was ratified by the said Stevensons ; and also, that the said plea is double in this, that it alleges an attempt to put in issue the authority of the defendant to execute the charter party declared on and also the matter of a subsequent ratification. And also that by the said declaration it is alleged and appears in the oyer of the said charter party that the charter party therein named was sealed and delivered by the said defendant in his own name and as his own deed, and not in the name or as the deed of any other person, which the said plea doth not deny nor confess and avoid.

The defendant joined in demurrer. The superior court gave judgment for the plaintiff on the demurrer. On the trial of the issue of fact the charter party was given in evidence by the plaintiff, as follows :

This charter party, made and concluded upon in the city of New-York, the twenty-third day of December, in the year one thousand eight hundred and forty-one, between J. D. Cathell, master and agent of the schooner Sage of Vienna, of the burthen of one hundred and fifty-one tons, or thereabouts, register measurement, now lying in the harbor of New-York, of the first part, and Medad Platt, of the city of New-York, agent for J. C. & M. Stevenson, of Newbern, of the second part, witnesseth that the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept

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and performed by the parties of the second part, do covenant and agree on the freighting and chartering of the said vessel unto the said parties of the second part, for a voyage from Newbern, North Carolina, to Barbadoes and two other ports to the leeward of Barbadoes, on the terms following, that is to say :

First. The said party of the first part doth engage that the said vessel in and during the said voyage shall be kept tight, staunch, well fitted, tackled, and provided with every requisite, and with men and provisions necessary for such voyage.

Second. The said party of the first part doth further engage that the whole of said vessel (with the exception of the cabin, the deck, and the necessary room for the accommodation of the crew, and the storage of the sails, cables, and provisions) shall be at the sole use and disposal of the said parties of the second part during the voyage, and that no goods or merchandise whatever shall be laden on board, otherwise than from the said parties of the second part or their agent without their consent, on pain of forfeiture of the amount of freight agreed upon for the same.

Third. The said party of the first part doth further engage to take and receive on board the said vessel during the aforesaid voyage all such lawful goods and merchandise as the said parties of the second part or their agents may think proper to ship.

And the said parties of the second part, for and in consideration of the covenants and agreements to be kept and performed by the said party of the first part, doth covenant and agree, with the said party of the first part, to charter and hire the said vessel as aforesaid on the terms following, that is to say :

First. The said parties of the second part doth engage to provide and furnish to the said vessel at Newbern, North Carolina, a full and sufficient cargo of pitch-pine lumber, red-oak hogshead staves, and twenty-two inch cypress shingles, and other articles both for the hold and deck.

Second. The said parties of the second part doth further engage to pay to the said party of the first part, or his agent, for charter or freight of the said vessel during the voyage aforesaid, in manner following, that is to say : sixteen dollars per thou-

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sand for pitch-pine lumber, sixteen dollars per thousand for red oak hogshead staves, two dollars and fifty cents per thousand for cypress shingles, and at the same rate of freight for other goods.

It is further agreed between the parties to this instrument, that the said parties of the second part shall be allowed for the loading and discharging of the vessel at the respective ports aforesaid lay days as follows, that is to say: at Newbern ten running days, and at Barbadoes and two other ports in the West Indies, dispatch without unnecessary detention, and in case the vessel is longer detained, the said parties of the second part agree to pay to the said party of the first part demurrage at the rate of twenty Spanish milled dollars per day, day by day, for every day so detained, provided such detention shall happen by default of the said parties of the second part, or their agents.

It is also further understood and agreed that the cargo or cargoes shall be received and delivered alongside of the vessel within reach of her tackles, or according to the custom and usages at the ports of loading and discharging.

It is also further understood and agreed that this charter shall commence when the vessel is ready to receive cargo at her place of loading, and notice thereof is given to the parties of the second part, or to their agent.

To the true performance of all and every of the foregoing covenants and agreements the said parties, each to the other, do hereby bind themselves, their heirs, executors, administrators, and assigns, (especially the said party of the first part, the said vessel, her freight, tackle, and appurtenances, and the said parties of the second part, the merchandise to be laden on board,) each to the other in the penal sum of one thousand eight hundred dollars.

In witness whereof, the said parties have hereunto interchangeably set their hands and seals, the day and year first above written.

Sealed and delivered in the presence of

A. W. WELDEN.

J. D. CATHELL, Agent, L. s.

MEDAD PLATT, Agent, L. s.

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It was proved on the part of the plaintiff that the vessel was loaded at Newbern, N. C., by the Messrs. Stevenson, who put a supercargo on board, who sold the cargo at the outward-bound ports and purchased and superintended the return cargo.

The defendant moved that the plaintiff should be non-suited, on the ground of variance between the charter party and the declaration, and that the charter party was the act and deed of the Messrs. Stevenson and not of the defendant; and upon the further ground that the proof on the part of the plaintiff showed that the plaintiff, from the making of the charter party, during the whole voyage, and until the final completion thereof, treated the Messrs. Stevenson as the parties of the second part in the instrument; and that by the acts of the plaintiff he had put such a construction on the charter party as precluded him from treating the defendant as the party of the second part.

The Court, JONES, Ch. J., decided that the charter party was set out in the declaration according to its legal effect, and that the charter party was the deed of the defendant and not of the Messrs. Stevenson; and that the plaintiff was not precluded by his conduct from treating it as the deed of the defendant. The defendant excepted.

The defendant then introduced in evidence two letters from the Messrs. Stevenson to himself, authorizing the defendant to engage a vessel, and approving of the charter of the plaintiff.

The chief justice charged the jury that the charter party was in judgment of law, under the circumstances in evidence before them, the deed of the defendant, and submitted to the jury the question of damages. The defendant's counsel excepted to the charge. The jury found a verdict for plaintiff for \$735.

A motion for a new trial by the defendant, at general term, was denied. The defendant brought a writ of error and removed the judgment to the supreme court, where the judgment of the superior court was affirmed. *Reported 3 Denio, 604.*

The defendant brought a writ of error, and removed the judgment into this court.

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Mills & Beckwith, Attorneys and
A. C. Bradley, Counsel for plaintiff in error.

I.—AS TO DEMURRER.

First. It is unnecessary to aver in pleading how agent's authority to seal was conferred. Affixation of seal by agent in presence of principal is good. (*Story, Agency*, § 51, and authorities cited, n. 2.) Even if authority were by instrument under seal, it is not necessary to be averred. (*Bailiffs of Ipswich v. Marston*, Cro. Ja. 411; *Dean v. Grover*, 2 Sand. 302, 305, a. b. n. 13; 1 Chit. Pl. 253, 7th Amer. from 6th London ed. a. authorities cited in n. g.; 6 Com. Dig. Pleader e. 9.)

Second. It is unnecessary to aver in pleading how ratification was made. (*The authorities above cited, except the first.*)

Third. Plea not double. The real fact averred is the agency of defendant and his authority. (*Story on Agency*, §§ 244, 251; *McLean v. Dunn*, 4 Bing. 722.) Several facts may be pleaded amounting to one result. (1 Chit. Pl. 564.) Averment of authority is a general term, embracing both previous power and subsequent ratification. Averment therefore of subsequent ratification may be tautology, but is not duplicity.

Fourth. True, the declaration alleges that defendant signed and sealed the charter party as and for his own deed. But the plea denies this, but admits a signing, and avoids the effect which the plaintiff seeks to give it, by averring agency and authority. (*White v. Skinner*, 13 J. R. 307; *Randall v. Van Vechten*, 19 J. R. 60; *Stone v. Wood*, 7 Cole, 453.)

Fifth. The declaration is insufficient. (*Fols.* 16, 17.) Charter has never commenced.



II.—AS TO BILL OF EXCEPTIONS.

First. Charter party should have been excluded, because of the variance. The phrase "parties of the second part," in the charter party, by just construction, means the Stevensons. But the declaration alleges it to mean the defendant. The contract is not set forth according to its true meaning and effect. (*Corning v. Townsend*, 23 Wend. 409; *Blood v. Goodrich*, 9 Wend. 77.) If liable at all, Platt is only liable for the performance of the du-

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ties assigned to them in the contract.* (*Principle of construction*, 2 *K. Com.* 554-5; *Code Napoleon*, §§ 1156, 1164; 3 *Chit. Com. Law*, 391; *Leery v. Goodson*, 4 *T. R.* 689.) Evidence of an agreement to deliver goods to defendant is a fatal variance from a count on an agreement to deliver them to a third person.—*Id.* (*Churchill v. Wilkins*, 1 *T. R.* 447; *Samuel v. Darch*, 2 *Stark. C.* 60; *Wyvill v. Shepard*, 1 *H. Bl.* 162.)

Second. Deposition of Lynch should have been rejected.

 [Not mentioned.] 

The deposition of Lynch in no way shows any act done by or on behalf of the defendant. It is wholly *res inter alios*. If the phrase “parties of the second part” means nobody but Platt, then the Stevensons were wholly unconnected with him, and their acts could not make him responsible.

Third. Plaintiff should have been non-suited. Non-suit should have been granted,

1. For variance, and

2. Because, in addition to the facts in the charter party itself to show that it was Stevensons’ contract, the plaintiff had himself put a construction on it to that effect.

Fourth. The court below erred in charging the jury that the charter party was, in judgment of law, under the circumstances in evidence, the deed of the defendant. The question of agency and authority should have been submitted to the jury; whereas the whole case was taken from them but the amount of damages. Platt had done enough to make his principals liable. A charter party may be without seal. (3 *Chit. Com. Law*, 388.) It is only when the act of agency is required to be done under seal that the authority by seal is necessary. (*Story Ag.* §§ 49, 154; *Evans v. Wells*, 22 *Wend.* 324, 339, 340-1, *VERPLANCK, senator.*) The use of a seal where none was necessary will not vitiate an act which without the ceremony would have been valid. (*Everitt v. Strong*, 5 *Hill*, 163; *Anderson v. Tompkins*, 1 *Brock, C. C.* 456; *White v. Cuyler*, 6 *T. R.* 176.)

MILLS & BECKWITH, *Attorneys for plaintiff in error.*
A. C. BRADLEY, *of Counsel.*

*D. D. Lord, Attorney and
Daniel Lord, Counsel* for defendant in error.

First. The declaration counts on a deed of charter party, *inter partes*, sealed with the seal of the defendant below, as party thereto, of which deed *profert* is made.

1. It is not competent for the defendant below, in a plea, not traversing the execution of the deed as alleged, to *aver* a different effect, or different description of party in the deed. He must either call for *oyer* of the deed, and demur, or rest on excluding the deed for variance on the trial. The deed must speak for itself, and can not be varied by averment. For this reason the second plea was bad.

2. The second plea, not denying the execution of the deed as averred in the declaration, could not vary its effect by alleging that he was an agent and executed it in that character; for an agent may bind himself personally for his principal in an instrument in which he is also named as agent. The second plea was bad also, for this cause.

3. The deed, as set out in the declaration, being under seal of the defendant, he was bound to show legal authority to bind his principal: this required authority by deed, and *oyer* of such authority, in order that the plaintiff might see on what ground he could pursue the principal. The second plea was also bad, for want of *profert* of such supposed authority. (*Bender v. Sampson*, 11 *Mass. Rep.* 44.)

4. The second plea was in like manner bad, for not showing ratification of the covenant by a deed of the principals, and for not containing *profert* of that deed. (*Blood v. Goodrich*, 9 *Wend. R.* 68; *Story on Agency*, §§ 49, 275, 273, 161, 155, 278.)

5. The second plea was also bad, for duplicity. Either previous authority or subsequent ratification, properly alleged, would be a good answer, if an answer at all. It was therefore double to tender issue on both. (*Stephen on Pleading*, 258, § 3, rule 1.) The plaintiff could, in replying, only tender issue on one of the answers, and therefore would be compelled to confess the other.

The demurrer therefore was rightly adjudged for the plaintiffs.

Second. The charter party given in evidence was sealed with the seal of the defendant only : he calls himself party in the attestation ; he is the only party of the second part executing the deed, and alone was bound by it as a deed.

The defendant has shown no authority under seal to execute a deed. He has shown no ratification by deed. He has not shown any communication to the plaintiff, either of his authority or of the ratification before suit brought.

On every principle, therefore, the defendant was the party of the second part, and bound as such. (*Talbot v. Godbolt*, *Yelverton*, 137 ; *Stone v. Wood*, 7 *Cow. R.* 453 ; *Spencer v. Field*, 10 *Wend.* 87 ; *Pentz v. Stanton*, *id.* 276 ; *Stone v. Gordon*, 3 *Maule & Sel.* 322 ; *Townsend v. Corning*, 23 *Wend. R.* 439 ; *S. C.* 4 *Hill's R.* 357 ; *Com. Dig. Fait*, C. 2, D. 2, l. n. ; *Abbot on Shipping*, 163, part 3, ch. 1, § 2, *old ed.* ; *new ed.* 244, part 4, ch. 1, § 1.)

Third. The charter party, while it showed that the defendant, by the form of the instrument, its attestation and execution, was the party contracting personally, also showed his representative position, so that,

1. The defendant covenanting personally for the Messrs. Stevenson, all acts in carrying out the adventure done to or by them, are, in judgment of law, done to or by the defendant as covenanting for their benefit ; the averments, therefore, of the declaration are legally and substantially true.

2. The defendant directed the plaintiff to obey the orders of Stevensons ; consequently all acts in carrying out the charter, done to or by them, were for this reason also, in judgment of law, done to or by the defendant.

Fourth. The question, what the defendant said as to the effect of the deed which he was signing is clearly inadmissible, as an attempt to vary the effect of a deed by an oral qualification. (*Evans v. Wells*, 22 *Wend. R.* 338.)

Fifth. Both parties to the deed were acting for absent persons ; the plaintiff engaged to go to Newbern before he was to obtain any performance of the charter, any cargo or freight from the charterers ; both parties, in fact, from the character of the covenants, must have relied on each other's personal covenants.

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Again, both parties having entered into a deed *inter partes*, and executed it in their own names, and not having executed it in the names of their principals, ought not to be allowed to withdraw from its well known and long established legal effect.

D. D. LORD, *Attorney of defendant in error.*

D. LORD, *of Counsel.*

19 J. 60 is overruled by 4 H., or if not is put upon the ground contract by public agents. (*Delaware Canal v. Du-bois*, 4 W.; *Story Ag.* § 278.) Comments on these cases. Doubtful authority at best, though distinguishable.

DECISION.—Judgment affirmed. Unanimous.

NOTE.—It was held by the supreme court, BEARDSLEY, J., delivering the opinion, that it was no answer to the cause of action to say, as the plea demurred to did, that the Stevensons made and executed the said charter party by the defendant as their agent. The defendant being named in the covenant as the party of the second part, and having duly executed it, by affixing his own seal, he was personally bound, whatever his authority or his intention might have been.

As to the exceptions taken at the trial, they could not be sustained, because, in law, the charter party given in evidence was the defendant's deed, and not that of the Stevensons. The Stevensons were not bound by it, but the defendant was.

Not reported in this court.

VAN GEISEN, plaintiff in error, *agt.* FULLER, defendant in error.

Questions discussed.

1. Whether a mortgage sale made in pursuance of a decree of foreclosure, which described the greater part of the premises situated in the *wrong county*, where the sale was made, was *inoperative and void*?

2. Whether the purchaser under a mortgage sale, who has received his deed, can bring ejectment before *confirmation of the sale*? And whether the doctrine of *relation* applies, after confirmation?

This was an action of ejectment brought by Fuller against Van Geisen for certain premises situated in the town of Clarkson, county of Monroe, containing 230 acres.

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The cause was tried at a circuit court held at Rochester, in April, 1842. Hon. NATHAN DAYTON, Circuit Judge. A special verdict was found, by which it appeared that the premises in question, with other lands, situated in the counties of Monroe and Orleans, were mortgaged by one Henry Davis and his wife to the Farmers' Fire Insurance and Loan Company in December, 1833, to secure \$12,000. In February, 1834, Davis and wife conveyed the premises in question, in fee, to Henry J. Hollister, who conveyed the same in fee to Abraham M. Schermerhorn on the 27th March, 1835. On the 24th February, 1840, the Farmers' Loan and Trust Company as successors, by statute, (*Sess. Laws*, 1836,) of the Farmers' Fire Insurance and Loan Company, filed their bill of complaint before the chancellor for the foreclosure of this mortgage. That besides Henry Davis and wife, the mortgagors, Abraham M. Schermerhorn and wife, Joseph D. Beers, President of the North American Trust and Banking Company, and others, were made defendants, as persons claiming some interest in the mortgaged premises, &c., but Cornelius Van Geisen, the defendant, was not made a party.

The bill of complaint was duly taken as confessed by all the defendants. A reference was ordered, to ascertain the amount, and a decree entered directing that the mortgaged premises "be sold at public auction according to the course and practice of said court, by or under the direction of Benjamin L. Bessac, one of the masters of said court, residing in the county of Orleans; that the said sale be made in the county where the mortgaged premises, or the *greater part thereof*, were situated, &c. The decree proceeded to give the usual directions, and some special directions as to the sale of any parcels of the premises sold since the execution of the mortgage.

That lot No 4, sec. 11, town 4, lots 10, 11, and 12, sec. 7, town 4, in all containing 480 acres, were described in said decree as situate in the town of Clarendon, and county of Orleans, whereas in fact, the same was situate in the town of Clarkson, and county of Monroe; so that from the decree it appeared that the greater part of the lands directed to be sold were situate in the town of Clarendon, and county of Orleans, when in fact

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the greater part thereof were situate in the town of Clarkson, and county of Monroe. But the aggregate value of the lands situate in the county of Orleans was greater than that of the lands situate in the county of Monroe.

On the 11th of September, 1841, at the village of Albion, in the county of Orleans, the master sold the premises in question, which were bid off by the plaintiff Fuller; and on receiving the amount of the purchase, gave Fuller a master's deed.

That the defendant, Van Geisen, was in possession of the premises in question prior to the filing of the bill of complaint, and continued in possession until after the commencement of this suit. Fuller exhibited to Van Geisen his master's deed, and informed him that he had become the owner of the premises, and inquired of Van Geisen by what right he claimed to hold said premises, and Van Geisen replied, "that he went into possession under a contract for the purchase of said premises made between him and Abraham M. Schermerhorn. The said James C. Fuller then inquired of the defendant if he had made the payments for the said land to the said Schermerhorn, as they became due according to the terms of his agreement with the said Schermerhorn; and he replied that he had not. That Fuller then informed him that if he would pay to him the amount which he had promised to pay said Schermerhorn for said lands, and which he had not been paid, that he, said Fuller, would convey to him the said lands. This the defendant declined doing; and stated that he did not intend ever to pay anything further toward the purchase of the lands. That Fuller then demanded possession of said lands from the said defendant, which the defendant refused to give, and thereupon this suit was commenced on the 9th day of October, 1841." The order for confirmation of the report of the master's sale became absolute on the 20th of January, 1842.

The charter of the Farmers' Loan and Trust Company contained a provision that "all sales under the mortgages to be taken or holden by the said corporation, &c., shall be made in the county where the said mortgaged property shall be situated."

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Judgment was rendered for plaintiff for the possession of the premises at January term, 1843. (*Reported* 4 *Hill*, 171.)

The defendant brought a writ of error, and removed the judgment into this court.

Haight & Chase, Attorneys and
Chauncey Tucker, Counsel for plaintiff in error.

First. The sale under which the defendant in error claims title to the premises described in the declaration, was inoperative and void, because the same was not made in the county where the property was situated. (*Sess. Laws of 1822, ch. 50, § 3, p. 47; 21 Wend. 467; Sess. Laws of 1836, p. 281.*)


Second. Although the sale should be deemed legal, the defendant in error was not entitled to recover, because at the time of commencing his suit, the sale had not been confirmed. (13 *Ves.* 517; 11 *id.* 559, *ex parte Minor.*)

1. The decree upon foreclosure provides that the purchaser be let into possession of the premises on production of the master's deed, and a certified copy of the order confirming the sale, if the same has become absolute. (*Rule 135 of court of chancery.*)

2. Independent of the provisions of the decree, the purchaser has only a contingent title until the order confirming the sale has become absolute, as until that time the purchaser or any party in interest may apply for a resale. (*Brown v. Frost*, 10 *Paige*, 247.)

3. The doctrine of relation has no application to this case. (*Ward v. Sackrider*, 3 *Caines*, 263; *Jackson v. Bard*, 4 *Johns.* 234; 16 *Viners Ab.* 293; *A. Lifford's case*, 11 *Coke*, 51.)

HAIGHT & CHASE, *Attorneys for plaintiff in error.*
 F. M. HAIGHT, *of Counsel.*

 Sp. verdict—judgment for plaintiff—decree to sell in co. where greater part of mortgaged premises situated—greater part was in Monroe—sale in Orleans—but by mistake in decree stated, were to be in *Clarendon*, which is Orleans, when in fact were in *Clarkson*, which is in Orleans (now Monroe)—sale confirmed—no objection having been made—deed given before

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order confirmation—first and greater part sale void because not made in proper county—in fact, partition was in both counties.

I. Decree, as to place of sale, is *not an adjudication of a matter in controversy, but a direction for the doing of a thing in futuro*:

7th J. 217; reject false and mistaken circumstances—that rule gives plaintiff this land—without it, he gets nothing—if good rule for him, it is for us also—same rule for both parties—mere direction to master—he must look at whole description and find out where to sell—error of his—not in *judgment of court*. (2 R. S. 255, 3d ed. 192, § 158.)

Order of confirmation is a mere formal order—an *order of course*—confirmed unless cause be shown in eight days.

If court against me on first point, no great hope of succeeding on the other—but still worth considering when confirmation at the time suit commenced. 🏠

🏠 REPLY.—General laws don't affect special provisions in a charter, unless specially mentioned. 🏠

*Henry R. Selden, Attorney and Counsel, and
Azor Taber, Counsel for defendant in error.*

First. The sale of the lands under the decree in chancery, in the county of Orleans, was regular and valid, and the purchaser acquired a good title under it.

The power to foreclose mortgages and to sell the mortgaged premises is given to the court of chancery alone. (1 R. S. 191, §§ 151, 192, 157.)



The court has power to order where the premises shall be sold.—🏠 even though out of the county. R. S. since charter, and applies to all sales in chancery. (1 R. S. § 157.) 🏠

The master was right in selling, where *from the decree* it appeared the greater part of the premises were situated; especially as the *greatest value was in fact there*.

But if he was wrong, it was a mere irregularity, which could be only objected to *by the parties*, and the confirmation of the sale concluded even them.

The provision of the charter of the Farmers' Loan Com-

pany, limiting a sale to the county where the premises are situated, may properly be confined to statutory foreclosures. (*Laws of 1822, p. 49, § 3.*)

 *Laws of 1822, p. 262, § 7.* First general law that made it necessary to sell in the county—this after the charter—charter applies to *statute* sales, not to sales *under a decree in chancery*. 

Second. The sale was complete by the execution and delivery of the deed, without reference to the report or the order of confirmation. (*Hoff. Master, 221, 222; 2 R. S. 192, § 158.*)

But if the report and confirmation were necessary to complete the title, those things when done make the title perfect *by relation* from the execution of the deed. (1 *Johns. cases, 75, 84, 89; 3 Cowen, 75, 80; 15 Johns. 309-316; 20 Johns. 3; 2 Wend. 507.*)

Third. The sale gave to the plaintiff in this suit all the rights of the mortgagee, and of Schermerhorn who held as grantee of the mortgagor—subject to the rights and equities which defendant had against Schermerhorn before the sale.

The sale is at least as effectual as a statute foreclosure would have been had Schermerhorn been the mortgagor, and that would give the purchaser all the rights of mortgagor and mortgagee. (4 *Paige, 58, 61.*)

The rights of all the parties to the suit are expressly cut off by the decree; of course, they must be vested in the purchaser. (*Case, pp. 8, 9.*)

The sale was equivalent certainly to a *voluntary conveyance* by all the parties.

If then any, or all the parties to the suit united, could have maintained ejectment against Van Geisen, this plaintiff can do so.

Fourth. Schermerhorn before the sale could have maintained ejectment against Van Geisen—and the plaintiff being possessed of all his rights, can do it.

1st. The defendant claimed to hold under Schermerhorn, which shows that his right, whatever it might be, was subordinate to that of the parties to the suit in chancery. (*Case, p. 12.*)

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2. The contract does not appear to have been in writing; and if it was, it could not be established by parol proof. (15 *Wend.* 588–592; *Cowen & Hill's Notes to Phil. Ev.* p. 544, note 416.)


3. But if his contract was in writing, he had made default, and was liable to ejectment. (*Jackson v. Moncrief*, 5 *Wend.* 26; *Jackson v. French*, 3 *Wend.* 337.)


If the defendant had any remedy, it was in equity, and could not be made available at law. (*Jackson v. Pierce*, 2 *John.* 221.)

4. The holding by Van Geisen was not adverse so as to affect the validity of the sale to the plaintiff, even treating it as a private sale. (*Jackson v. Johnson*, 5 *Cowen*, 74; *Jackson v. Camp*, 1 *Cow.* 605.)

The doctrine of adverse possession does not apply to sales under judgments and decrees. (*Jackson v. Collins*, 3 *Cow.* 89; *Jackson v. Anderson*, 4 *Wend.* 474.)

H. R. SELDEN, *Attorney for defendant in error.*

 Decree not *void*—even if erroneous. (10 *J.* 167; 11 *J.* 177; 17 *J.* 145; 1 *R. L.* 372,) was nothing in former law as to where statute sales should be made.

Statute charter don't touch the case where land is in two counties—that is an *omitted case*—in general law, two mos. after, leg'r. thought of case where land in two counties. No., in charter was forgotten, not thought of, (2 *R. S.* 192, § 157.) Chancellor may order sale in *any* county, in all cases. 

DECISION.—Judgment affirmed, unanimous.

NOTE.—It was *held*, by the supreme court, (COWEN, J., delivering the opinion,) that the master's sale passed the title presently; and the objection that the suit was prematurely brought could not avail. Besides, all question upon that matter was removed by the doctrine of relation. The confirmation of the sale related to the date of the deed; thus overreaching the claim of a mere intruder into the premises.

As to the rights of the defendant, *held*, that Schermerhorn (under whom he claimed to hold by contract) and all other proper parties having been brought into court, and the defendant being a mere naked possessor, although in before the bill was filed, had taken no title by which he stood connected in any way with the mortgagor or those claiming under him; no right of his was overreached, because he had none.

Held, that had the sale been made under a power contained in the mortgage,

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the auction must have been in the counties respectively where the lands lay. But the provision in the charter did not take away the jurisdiction of the court of chancery. Even if the provision be regarded as mandatory and restrictive upon the court, it was but directory; and the most that could have been done by way of impeaching the decree was to appeal. The proceeding could not be inquired into collaterally. The decree binds till it is reversed. The charter might be satisfied by confining it to a summary foreclosure, by advertisement.

The master governed himself by the location appearing on the face of the decree, in which he was right. The defendants in the chancery suit were the only persons who could complain. And they were then precluded. A mere stranger could not raise the question collaterally.

Judge COWEN said the case might be stated in this way: "The decree misjudges on a material fact, the location of the land; and a stranger claims to contradict it by a special verdict."

Not reported in this court.

WAMBAUGH, Appellant, *agt.* GATES, AND WIFE, AND OTHERS,
Respondents.

Questions discussed.

1. As to proper parties.

2. Whether *lands* aliened in good faith, by an heir at law or devisee before the commencement of a suit, for the recovery of a *debt* due from the testator or intestate, for which judgment had been recovered against the executors and execution returned unsatisfied, is *liable*, in the hands of the purchaser, for the payment of such debt?

3. Whether a creditor of a testator must not first exhaust all his remedy against the personal estate of the decedent, or show that there is no personal property, before he can file a bill to enforce an equitable lien upon the interest of legatees in lands whose legacies are charged thereon?

The facts of the case, as they appeared from the pleadings and proofs, were as follows: Jonathan Boyer died in January, 1828, seized of a valuable farm at Big Flats, in Chemung county, and of other real property in this state and in the state of Pennsylvania, and of a considerable personal property. By his will, he devised to his son, Philip Boyer, a lot of land containing fifty acres, depending upon the life of P. Michael, provided the devisee should pay to his sister Betsey a legacy of five hundred dollars within one year, and a horse, saddle, and bridle, and a

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cow and six sheep. And he devised to his son, Samuel Boyer, his homestead farm, of about one hundred and twenty acres, being the residue of his real estate at Big Flats, and directed such devisee to pay to each of his other four daughters, Polly, Susannah, Mary, and Catharine, a legacy of five hundred dollars, payable when they should respectively arrive at the age of twenty-one. The testator bequeathed to his son John a legacy of two hundred dollars, to be paid by his executors after deducting therefrom the amount of John's indebtedness. And he devised to the lawful heirs of his son John the farm in Pennsylvania, whereon his said son then lived, and charged those devisees with the payment of a legacy of three hundred dollars to his grand-daughter, E. Fritchley. The residue of his personal estate the testator directed his executors to sell, and apply the proceeds thereof to the payment of his debts. And he appointed his sons Philip and Samuel his executors, who made out probate of the will and took out letters testamentary thereon, on the 4th of February, 1828. The principal, if not the only debts which the testator was liable for at the time of his death, was a note of about nine hundred dollars, given by him to W. Wambaugh, the complainant in this suit, as the principal debtor, or as surety for his son Philip, and a bond of about three hundred dollars to C. Winans, which A. Bennett had signed with him, as his surety, and which after his death such surety was compelled to pay.

On the 20th of January, 1830, Samuel Boyer sold and conveyed the farm devised to him at Big Flats to his brother Philip, for the consideration of three thousand eight hundred dollars, with warranty; which conveyance was duly recorded on the 23d of the same month. And on the 15th of August, 1832, Philip Boyer conveyed the same farm to S. Poultney and W. M. Ellicott, together with all his other lands in that county, which last-mentioned conveyance was recorded in December, 1832. In 1833, Wambaugh brought a suit against the executors, upon the note of their testator, in the supreme court; and in November of that year he obtained a judgment against them as such executors, in the usual form, for one thousand four hundred fifty-nine dollars and sixteen cents damages, and forty-one

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dollars and twenty-two cents costs, to be levied of the goods and chattels of the testator in their hands, if sufficient; and if not, then the costs to be levied of the proper goods of the executors.

An execution was afterward issued upon this judgment, under which the sheriff advertised and sold the farm devised by the testator to S. Boyer, and other lands in which the defendants in that suit were supposed to have an interest, under the will of the testator; and the said farm and other lands were purchased by Wambaugh, for the price or sum of one thousand nine hundred and thirty-seven dollars, and the surplus proceeds of such sale were applied to the payment of Bennett's debt, with the consent of S. Boyer. The sheriff executed a deed to Wambaugh, as the purchaser at such sale, the 25th of October, 1837.

Catharine, one of the daughters of the testator, married A. H. Gates; Mary married S. Beard; Susannah married G. Van Derin, who subsequently died; and Polly married John Barnes, and died in 1834, leaving her husband surviving. In August, 1835, Gates and wife, Beard and wife, and Mrs. Van Derin commenced a suit in chancery, before the vice chancellor of the sixth circuit, against S. Boyer, P. Boyer, S. Poultney, W. M. Ellicott, E. Poultney, and W. Wambaugh, for the purpose of obtaining satisfaction of their legacies out of the lands devised to S. Boyer. P. Boyer afterward died, and the suit was revived against his heirs-at-law. The subpœna in that suit was personally served upon S. Boyer and W. Wambaugh; but the other defendants being non-residents of the state, the bill was taken as confessed against them, as absentees. W. Wambaugh appeared and answered the bill in that suit, and the bill was taken as confessed against S. Boyer, for want of appearance. The cause was heard upon pleadings and upon the master's report, as to the rights of the absentees and the infant children of P. Boyer; and on the 21st of September, 1838, the vice chancellor made a decree, dismissing the bill as to the defendant W. Wambaugh, without prejudice, and declaring that the legacies to the testator's daughters, who were complainants in that suit, were due, and were an equitable charge upon the lands devised to S. Boyer, in whose hands soever the said lands might be,

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claiming under him ; and that S. Boyer was also personally liable for the payment thereof. The decree also directed a sale of the lands so devised to S. Boyer, by one of the masters of the court of chancery ; and that such master, out of the proceeds of the sale, pay to the complainants' solicitor his costs and a reasonable counsel fee, and the fees of the master, and to the guardian *ad litem* of the infant defendants his costs. And that such master pay the amount due to the respective complainants for their legacies, with interest ; and that he should bring the residue of the proceeds of the sale into court, to abide the further order of the court. The decree also gave to the complainants the right to elect to proceed by execution against S. Boyer personally, to the amount of their respective legacies and costs. It also provided for the protection of the supposed rights of the infant children of Mrs. Barnes, by directing that the amount of the legacy given to their mother, with interest, should be paid to them out of the proceeds of the sale of the premises, if they should come in and claim the same upon the foot of that decree.

In December, 1838, W. Wambaugh filed his bill in this cause against the complainants in the suit in which such decree was made, and against S. Boyer, setting forth the several matters above stated in substance, except as to the conveyance of the devised premises by S. Boyer to his brother Philip, and by the latter to Poultney and Ellicott.

The bill also charged that S. Boyer and P. Boyer, after being advised that the complainant's proceeding to sell under his judgment was irregular, suffered him to proceed in ignorance of his rights, and to expend moneys for the benefit of the estate of their testator, with the intention that he should be deceived and defrauded. The complainant therefore prayed that the complainants in the former suit might be restrained by a decree of the court from proceeding to a sale of the farm devised to S. Boyer, under and by virtue of the decree of such former suit, and be directed to relinquish all claim to the land, and to give complainant's title thereto ; or that they and their confederates might be decreed to pay him the amount of his judgment, with interest and costs, and the surplus moneys on his bid upon the

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sale, which had been paid to Bennett for the benefit of the estate, and that the amount of his claims might be decreed to be a lien upon the premises, prior to the claim of the legatees under their decree, and to be first paid out of the proceeds of the sale of the premises; or for such other or further relief as might be proper under the circumstances of the case.

The defendants in this suit put in their joint and several answer to the complainant's bill, by which they admitted that in 1819 the complainant loaned to the testator seven hundred dollars, for which the testator gave his note, which note was also signed by his sons Samuel and Philip as his sureties, payable on demand, with interest; but they stated upon information and belief, except S. Boyer, who answered upon his own knowledge, that Philip Boyer afterward assumed the payment of that note by an arrangement with his father, and that a new note was afterward, in 1822 or 1823, given by Philip Boyer to the complainant, for the amount of such original note and another demand against Philip, in which the testator joined as surety for his son. And the defendants state, upon information and belief, that both notes signed by the testator were joint notes, and were not joint and several.

The defendant S. Boyer also stated in his answer that the payment made by him upon the note as stated in the complainant's bill, in the year 1831 or 1832, was not paid by him as executor, but was paid out of his own private funds, although it was endorsed upon the note as a payment by him as executor, at the special request of the complainant. The defendants therefore insisted in their answer, that the cause of action upon the note of the testator was barred by the statute of limitations.

They also stated in their answer the conveyance by S. Boyer of the premises devised to him, to P. Boyer, and the conveyance thereof by the latter to Poultney and Ellicott.

The answer further stated that the suit against the executors was commenced by collusion with, and at the request of P. Boyer, for the purpose of having the devised property sold under a judgment to be recovered thereon, to coerce a settlement with Poultney and Ellicott; in other words, to defraud them. And that the complainant purchased at the sheriff's sale, with

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full knowledge of all the facts, and of the previous conveyance of the premises, and for the purpose of coercing Poultney and Ellicott to make a compromise with P. Boyer.

The defendants also charged in their answer, that the judgment in the suit against the executors was suffered to be taken by default, for the same collusive purpose, and that said judgment was of no force and validity, as against the legatees of the testator, and that the complainant's claim was barred by the statute of limitations.

The answer also stated that John Boyer, one of the devisees of the testator, was dead, and that he left several children, who were still living. Most of the other facts stated in the bill were admitted by the answer. But the defendants, in their answer, insisted that the legatees were improperly joined with S. Boyer in the suit; and if S. Boyer was a proper party, then that the heirs and the grantees of P. Boyer were also necessary and proper parties. And they further insisted, that the other devisees and legatees of the testator, or their legal representatives, were necessary parties, and were bound to contribute to the payment of the complainant's debt, if he had any.

They also insisted that by the sale and conveyance of the devised premises by S. Boyer, before the commencement of this suit, the complainant had lost the right to seek satisfaction of his demand by a sale of the devised estate for that purpose.

The cause was heard upon pleadings and proofs. The vice chancellor decided, that before the legatees could recover their legacies out of the devised property the debts of the testator must be paid; that, by the recovery of a judgment against the executors, the complainant established his claim against the estate, and was legally entitled to payment out of the personal estate, if there was any, and if not, then from the real estate; and that he was also entitled as against the real estate to the amount he paid Bennett, out of the proceeds of the sale of the devised estate upon execution. He therefore directed a reference to a master, to compute the amount due upon the judgment, and for the payment to Bennett with interest, and the several legacies due under the former decree, and that the master proceed to sell under the former decree the premises devised to S. Boyer,

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and that he pay out of the proceeds of such sale the costs and expenses of the former suit, as directed by that decree, with interest on such costs and expenses, and the costs of the defendants' solicitor in this suit; that he then pay to the complainant in this suit the amount of his judgment, with interest and costs, the amount paid to Bennett, with interest thereon, and his costs in this suit to be taxed; and that he then pay out of the proceeds of the sale the legacies decreed to be paid in the former suit.

The defendants appealed to the chancellor, who made a decree as follows: The decree of the vice chancellor is clearly erroneous,—it must be reversed. The bill, as to the appellants, except Samuel Boyer, must be dismissed with costs, but without prejudice to their rights in any future litigation. But as to the defendant, Samuel Boyer, the surviving executor, I think there is sufficient in the pleadings and proofs to entitle the complainant to a decree against him, for relief. It is very evident that the sale of the devised premises, upon the execution against the executors, and the bidding in of the property, for the amount beyond what was due upon the judgment, when neither of the defendants in the judgment had any estate or interest therein, either in their own rights, or otherwise, was founded in a mistake. It is true, the judgment against the defendants was personal, so far as the costs of the suit were concerned. And if the title to the devised premises had been in either of the defendants, in such judgment, at the time of the docketing thereof, I am not prepared to say that the purchaser would not have obtained the legal title, under that sale. But the answer and the proofs in this cause show, that the whole of the devised property had been transferred to Poultney and Ellicott, previous to the recovery of the judgment. The complainant, therefore, if he desires it, is entitled to a decree, setting aside the sale of the devised premises upon the execution, and the deed executed by the sheriff, and declaring the judgment in full force as against S. Boyer, as the surviving executor, notwithstanding such sale; and referring it to a master to take an account of the personal estate of the testator, which came to the hands of the executors, or which they might have received and applied to the payment of the complainant's debt

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by due diligence, and charging him with interest on the value of such real estate after the expiration of eighteen months from the death of the testator, to the end, that upon the coming in of the report of the master, such a decree may be made against S. Boyer, for the satisfaction of the debts due to the complainant, as may be just, and reserving the question of costs between those parties, and all other questions and directions as to them or their rights, in the mean time.



The proceedings to be remitted to the vice chancellor. *Reported 11 Paige, 505.*

From this decree, Wambaugh, the complainant, appealed to this court.

*Ziba A. Leland, Attorney and Counsel, and
B. Davis Noxon, Counsel for appellant.*

First. As the first suit before the vice chancellor was dismissed, as to the appellant, without prejudice, he stands in this suit at least in as good a situation, as to his rights, as he would in the first suit properly presenting all his rights.

Second. The legacies given to three of the respondents, by the will of Jonathan Boyer, were not made by that will either an equitable or legal charge upon the premises in question. (*Lupton v. Lupton*, 2 *John. Ch. Rep.*, 614-623, 624; *David v. Gardner*, 2 *Pr. Wills*, 187; *Keeling v. Brown*, 5 *Ves.* 359-62; *Knightly v. Knightly*, 2 *Ves.* 328, 330-1, and note to *Bost. ed.*; 7 *Paige*, 427.)

 Where take under *residuary clause*, different—No case where bare direction to pay creates a charge. Executors never filed an inventory. 

Third. The bill in the first suit was not properly framed to reach the lands by an equitable charge or lien. For that purpose the bill should have averred that the personal estate was exhausted, and the same should have been supported by proofs. (*Lupton v. Lupton*; *Livingston v. Newkirk*, 3 *John. Ch. Rep.* 319; *Tole v. Hardey*, 6 *Cow.* 334, 340; *Watson v. Brickwood*, 9 *Ves.* 447-8, 453; *Powell on Devises*, ch. 35, 682; 22 *Law Lib.* 364; *Story Eq. Pl.* § 104, n. 1, §§ 105, 106; 2 *Paige*, 19; *Smith v. Smith*, 4 *Paige*, 271.)

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Fourth. The debts of Jonathan Boyer were made a charge upon all of his real estate, as well as personal, by his will—and a charge prior to legacies. (*Williams v. Chitty*, 3 *Ves.* 551; *Knightly v. Knightly*, 2 *id.* 328–30, and note to *Boston ed.*; *Shallcrass v. Finden*, 3 *id.* 738; *Harris v. Ingledew*, 3 *Pr. Wills.* 91; *Story Eq. Juris.* §§ 1244–1247 *a*, and notes *Bost. ed.*; 1 *Ves.* 436; 2 *id.* 330.)

Fifth. By the statute law of the state, the debts of deceased persons are made a charge upon all of their estates, both real and personal—and a charge prior to the legacies. (2 *R. S.* 2d *ed.* 28–47; notes *a to 1*, *Ves.* 436, *Bost. ed.*; 3 and 4 *William IV.*, *ch.* 104; *Story Eq. Pl.* § 163, note 3, 1; *Potter v. Gardner*, 12 *Wheat.* 501; *Wilkinson v. Leland*, 2 *Peters*, 658–9; *Story Eq. Juris.* § 1216, *a, b, c*, 1217; *Powell on Devises*, *ch.* 35, 664; 22 *Law Lib.* 355.)

Sixth. The sheriff's sale and deed made a good title in the appellant at law as against all of the respondents. (*Exr. of Lansing v. Lansing*, 18 *Johns. Rep.* 502; 2 *R. S.* 2d *ed.* 365, § 6; *Id.* 30, § 41; *Id.* 29, § 32; *Butler v. Hemstead*, 18 *Wendell*, 666.)

Seventh. The sale and deed made a good title in appellant in equity as against all of the respondents.

1. The sale was made virtually by S. Boyer, as well as by the sheriff. (*Storms v. Barker*, 6 *John. Ch. Rep.* 166–8.)

2. S. Boyer had power to sell the lands devised to him to pay debts and legacies. (*Potter v. Gardner*, 12 *Wheat.* 498, 502; 7 *Paige*, 427.)

3. The avails were applied to pay the debts of a prior lien, and purchased in good faith and for a valuable consideration. *Walwyn v. Lee*, 9 *Ves.* 24, 31; *Jackson v. Chamberlain*, 8 *Wend.* 620; 1 *Paige*, 135; *Parks v. Jackson*, 11 *Wend.* 447; 1 *R. S.* 740, § 3; *Story Eq. Juris.* §§ 410–419; *Story Eq. Pl.* § 604, *a*; 2 *Peters*, 656, &c.)

Eighth. The appellant having in good faith purchased the legal title of the person in possession, he can tack to that his equitable claim, and hold under both.

Ninth. At all events, the first suit should have been brought to redeem on paying appellant's claims or prior equities, and

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the bill should have set forth all the facts constituting the appellant's rights, the offer of legatees to pay appellant's claims, and have averred their willingness to pay at time of commencement of suit. For this purpose, that bill was totally defective. (*Buckman v. Frost*, 18 *John. Rep.* 560, 570-1; *Story Eq. Pl.* § 257; 1 *Paige*, 131, 135.)

Tenth. The respondents have no reason to complain of the decree of the vice chancellor; it was as favorable to them, if not more so, than equity required, and the decree of the chancellor reversing the same should be reversed. (*Foster v. Wilber*, 1 *Paige*, 537-41; *Laws of 1837*, 524, § 4; 2 *R. S.* 32, § 52; *Id.* 26, § 17; *Id.* 31, § 45; 18 *Wend.* 666; *Northrup v. Hill*, 1st *Cas. in Ch.* 136; *Anon.* 1, *Vern.* 162; *Galing v. Dorner*, *id.* 482; *Note in Ch. Cas.* 136-8; *Hardwicke v. Mynde*, 1 *Aust.* 112; *Walker v. Meager*, 2 *Pr. Wills*, 550-2; *Kidney v. Caussmaker*, 12 *Ves.* 154; *Graves v. Powell*, 2 *Vern.* 248; 2 *John. Ch. Rep.* 626-7; *Story Eq. Juris.* § 92; 2 *R. S.* 31, § 42.)

Eleventh. If the personalty is wasted by the executors, still the creditor has the prior lien upon the realty, over the legatees claiming a charge.

Twelfth. At the time the bill was filed, the premises in question might have been sold by an order of the surrogate, to pay appellant's judgment and the Bennett debt, had not circumstances intervened making it necessary to file a bill in chancery, to wit: the sale and deed by the sheriff. The fact that the executors had not filed an inventory, and the existence of the first suit by the legatees, a resort to a court of chancery became necessary to do what the surrogate could otherwise have done; and the decree should be as ample. (1 *R. L.* 450, § 23; *Jackson v. Robinson*, 4 *Wend.* 437-42; 2 *R. S.* 39, § 1; *Laws of 1837*, 536, § 72.)

Thirteenth. The bill was properly framed to meet the decree made by the vice chancellor to obtain a fund in the power of the court. (*Story Eq. Pl.* § 208; *Gellispie v. Alexander*, 3 *Russ.* 130; *Greig v. Summerville*, *Russ. & Mylne*, 338; *David v. Fraud*, *Mylne & Keene*, 200; *Story Eq. Pl.* 106.)

Fourteenth. It is not in the power of the respondents to ob-

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ject that the testator's personalty was not exhausted, for they should have seen to that in the first suit, and the surviving executor cannot be called upon a second time to account for the personal estate.

Fifteenth. Sufficient appears from the pleadings and proofs to show at least *prima facie* that there was a deficiency of personalty to pay debts. (*Story Eq. Juris.* § 1216, *b, c*; *Story Eq. Pl.* § 257, *a.*)

Sixteenth. The bill was properly framed as to parties. (*Story Eq. Pl.* §§ 104, 106, 164, 203, 205, 207 *a*, 208; *Pritchard v. Hicks*, 1 *Paige*, 270, 273; 3 *John. Ch. Rep.* 556; *Story Eq. Pl.* §§ 140, 141, 148; *Ed. on Parties*, 172, *art.* 83; *Id.* 139, *art.* 88; 2 *Pr. Wills*, 550; *Story Eq. Pl.* § 150 *and note*; *Id.*, § 163, *notes* 3, 1; 12 *Wheat.* 499, 500; *Talfair v. Stead*, 2 *Cranch*, 407; 2 *R. S.* 40, § 6.)

1. It was not necessary to make the purchasers parties. If they have any rights, it is by title paramount, and not prejudiced by this suit. (*Story Eq. Pl.* § 230; *Id.*, § 272, *and note* 3.)

2. It was not averred in the answer or proven that they are *bona fide* purchasers for a good consideration and without notice. (3 *Pr. Wills*, 94; 12 *Wheat.* 499; *Gallatin v. Cunningham*, 8 *Cow.* 361, 374; 12 *Wheat.* 499.)

3. This objection of *bona fide* purchasers can only be taken by the party interested, and that should properly be by plea.

4. They abandon their rights by not setting them up in the first suit.

5. The heirs were not necessary parties, especially as the will is admitted on both sides.

6. The heirs of the co-executor were not necessary parties, for they live out of the state—have received nothing and claim nothing of the estate.

7. None of the legatees were necessary parties, except those who were prosecuting the first suit—and they were necessary parties to enjoin them from receiving the fund. (*Colvert's Parties in Eq.* 128–138.)

8. As three of the legatees were allowed to prosecute for, they are competent to defend the rights of their co-legatees.

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9. There was no objection taken that Barnes or Betsey were not made parties. (3 *John. Ch. Rep.* 429.)

10. If Barnes or Betsey were necessary parties, the fact should have been pleaded. (*Story Eq. Pl.* 745 and note 2.)

11. Want of proper parties was not a good reason for reversing the decree of the vice chancellor. (*Colt v. Lasner*, 9 *Cow.* 320, 329, 330, 334.)

Seventeenth. The chancellor, after properly deciding that the purchasers were not necessary parties, erred in defending their imaginary rights.


Eighteenth. The objection taken by way of statute of limitations is not tenable.

1. The point raised is whether the cause of action arose within six years next before the death of the testator, and no other. (3 *Paige*, 417-18.)


2. There is no statute bar for a case like this after death of testator.

3. The cause of action arose within ten years from the commencement of this suit.

Z. A. LELAND, SOL'R,
and of Counsel for appellant.

 *B. D. Noxon*, in reply. If there have been mistakes in this business, or in the pleadings, we should not lose our debt and all our rights—court of chancery could give us relief—if we ought to pay costs, we must pay it—but we should not lose all.

If more parties are wanting, they may be brought in—if bill dismissed, the statute of limitations may be a bar—defendants (except Samuel) are not strictly devisees, unless so far as interested in the real estate—statute don't apply.

Concede that sale to Poultney and Ellicott cuts us off, still if these legatees have a right against the vendees for their legacies, we ought to have their remedy to the extent of the legacies—debts preferred to legacies—court of chancery might compel them to act for our benefit. If they had gone under the decree and collected their legacies, we could call on them to pay the money in satisfaction of our debt. 

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John A. Collier, Attorney and Counsel for respondents.

First. The bill should be dismissed, for the want of proper parties.

1. The representatives of Philip Boyer, the co-executor and devisee, should have been made parties.

2. All the legatees under the will of Jonathan Boyer should have been made parties.

3. Samuel Poultney and William M. Ellicott, the grantees of Philip and Samuel Boyer, should have been made parties. (2 *Paige R.* 15, 280; *Edwards on Parties*, 1, 3, 121, 123; 2 *Bibb*, 184, 273, 276; 3 *Equity D.* 100-104; 3 *Munford*, 514; 1 *Munford*, 437; *Breese, (Ill.) R.* 124; 4 *J. J. Marshall, R.* 232; 2 *Harr. & Gill*, 94; 4 *Harr. & John*. 333; 4 *Wash. C. C. R.* 631.)

Second. The legacies to the defendants and respondents, Catharine Gates, Mary Beard, and Susannah Van Derin, were an equitable lien upon the lands devised to Samuel Boyer, in whose hands soever the same might be; and so it was adjudged by the vice chancellor, by his decree of 21st September, 1838, all the necessary parties being before the court in that original suit. (7 *Paige*, 421, 424, 425; 9 *Paige*, 534; 3 *Cow. R.* 133; 6 *Cow.* 333; 2 *P.* 23; 10 *J.* 148; 18 *J.* 41; 12 *W.* 53, 95.)

Third. The lands which the complainant Wambaugh sought to charge, by the bill in this cause, having been aliened before suit brought against the heirs or devisees, are not therefore chargeable with the debt. (2 *R. S.* 454, §§ 47, 49, 51, 60, 61; 2 *Paige R.* 592; 7 *Paige*, 361; 20 *Johns. R.* 414; 9 *P.* 29, 45.)

Fourth. The case on the part of the complainant is totally defective in not averring on the face of the bill, and proving affirmatively, that the personal estate of Jonathan Boyer was not sufficient to pay the debts, or that after due proceedings before the surrogate, and at law, complainant was not able to collect his debt out of the personal estate. (2 *R. S.* 451, § 26; 452, § 27, 33, *p.* 455, § 56; 5 *Paige R.* 254, 259; 9 *Paige*, 28, 90, 92; 3 *Johns. Ch. R.* 148; 7 *Paige R.* 421, 425; 2 *Johns. Ch. R.* 614, 628; 1 *Munford's R.* 437; 7 *J. J. Marsh.* 254.)

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Fifth. If the complainant has any remedy against the *heirs*, or *devisees*, or *legatees*, as such, they must be made *joint* parties, and must be *jointly* chargeable. Nor could a claim against Philip Boyer and Samuel Boyer, as executors, or against Samuel Boyer individually, be properly blended in the same bill with a claim against the other defendants, in a different character. Such a bill is objectionable as multifarious, and combining causes of action which cannot properly be united in the same bill. (2 *R. S.* 454, § 42; 456, § 60; 5 *Paige R.* 254, 259, 260; *Laws of 1837*, p. 537, § 73; 9 *Paige*, 90; *Edwards on Parties*, 10, 130.)

Sixth. The complainant, if a just creditor, has a remedy only against the real or personal estate. If against the *personal*, he must look to the executors in their representative character; if against the *real*, he must seek it *in rem*, bringing all the proper parties before the court; or against the heirs and devisees alone who have aliened before suit brought. Neither of these remedies will reach Beard and wife, Gates and wife, or Mrs. Van Derin; and the bill is not framed so as to give the proper relief against Samuel Boyer, even supposing him, under any circumstances, to be liable.

Seventh. The judgment against Philip and Samuel Boyer as executors did not bind the real estate, nor was it in any respect evidence, or available against those not parties to it, nor was it an admission of assets even as against the executors, nor could an execution properly be issued upon it, except by order of the surrogate, or until their account, as executors, was rendered and settled. (8 *Wend. R.* 500; 2 *R. S.* 88, § 32; 18 *Wend.* 666, 668; 9 *Wend.* 448; 5 *Hill*, 131, 135.)

Eighth. The complainant's claim is barred by the statute of limitations; certainly so, except so far as he can avail himself of this judgment against the personal estate, to be paid in the course of administration. The devisees, as such, and certainly all the legatees, not being parties to that suit, are not bound by the judgment, and if the debt or demand "remains against the estate of the deceased, to the same extent as before, and to be established in the same manner, as if no such judgment had been recovered," which is the express provision of the act of

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1837, then the legatees, whom the complainant now seeks to charge, or the devisees as such, can avail themselves of the statute of limitations, and they have set it up accordingly in their answer. (2 R. S. 301, § 49; 448, § 8; 24 *Wend. R.* 587, 594; 14 *Wend.* 90, 97, 98; 2 *Paige*, 574; 19 *Wend. R.* 491; 5 *Paige*, 34; *Laws of 1837*, p. 536, § 72; 1 *Munford*, 437; 9 *Cow.* 132; 7 *Conn.* 172, 178; 6 *J. Ch.* 373; 12 *Wheat.* 565, 567.)

Ninth. The legatees, if chargeable or liable at all, to any creditor of testator, are only liable to the extent of their assets when they shall have come to their hands. Yet the complainant files his bill against them, claiming his debt and costs, without either averring or proving, nor is it now pretended, that they have ever had any assets in their hands. (*See authorities cited under fourth point*; 2 R. S. 452, §§ 27-30.)

Tenth. The real estate which the complainant seeks alone to charge by the frame of the bill, not being liable, under any circumstances, for the complainant's debt, and not being liable to Mrs. Beard, Mrs. Gates, and Mrs. Van Derin, except upon the ground that their legacies were an equitable lien upon the lands, as against all who derived their title under the will, the complainant has no remedy, or cause of complaint, against those legatees. He cannot reach the land himself, by a direct bill and application to all the equitable powers of the court, with all proper parties; nor can he make *cat-paws* of the legatees to reach this property for his benefit; much less can he stand by until the legatees get, in their own right, and at their own expense, what the complainant has no legal or equitable claims to, and then take to himself the whole of the *spoils*, which he has not contributed, and could not contribute, to win.

Eleventh. Even if complainant were entitled to a decree against the defendants, the premises he seeks to charge, could not properly be sold by a master, but the complainant could only, after a decree, be entitled to issue execution in the common form, which would not reach the lands he seeks to charge. (2 R. S. 454, § 47; 5 *Paige*, 254; 7 *Paige*, 354, 361.)

Twelfth. By the decree of the vice chancellor, the whole of the complainant's debt against testator is charged upon that

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portion of the estate which was devised to Samuel Boyer, instead of being made chargeable, as it should have been, if at all, first, upon the personal estate, and then, upon *all* the lands devised, *pro rata*. The effect of this decree is, to exhaust the whole fund, which is alone chargeable with these legacies, whereas a *pro rata* charge would, or might, have left enough to pay them. Thus: Suppose the shares of Philip, Samuel, and John (including the devise to his children) to be equal.

Samuel sold his share for,	\$3,800.00
Complainant's debt,	\$1,510.32
Bennett's debt,	363.28

\$1,873.60

Samuel's share of this, say $\frac{1}{3}$ d,	624.53
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Would leave in his hands,	2,175.47
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If he paid the three legacies of five hundred dollars chargeable upon his share,	1,500.00
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It would still leave him a balance of,	\$675.47
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(3 *Johns. Ch. R.* 148.)

Thirteenth. The complainant having sold the lands upon an execution confessedly irregular, and bid three hundred and sixty-three dollars and twenty-eight cents more than the amount of his execution, which was paid over to another creditor, real or pretended, without authority, this demand, which was also barred by the statute of limitations, is made chargeable solely upon the land devised to Samuel, and at the expense, and to the exclusion, of the legatees, defendants.

Fourteenth. The original decree of the vice chancellor ought to be reversed, and the complainant's bill be dismissed, as to all the defendants, with costs.

JOHN A. COLLIER & SONS, *for respondents.*

JEWETT, Ch. J. A testator's personal estate is, in equity as well as at law, the natural and first fund for the payment of his

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debts, (*Booth v. Blundell, Merrivale's Rep.* 192; 2 R. S. 87,) and if such estate be insufficient, his real estate, except such as is devised expressly charged with the payment of debts, is next liable and may be leased, mortgaged, or sold, by order of the surrogate having jurisdiction, on the application of his personal representatives or any of his creditors, and the proceeds applied in payment or satisfaction of such debts as remain unsatisfied and not secured by mortgage upon land executed by the ancestor or testator. (2 R. S. 99, § 1, 20; *Laws* 1837, p. 531, § 41; p. 536, §§ 72-74; 1 R. S. 749, § 4.) In case the testator's personal estate, out of which the legacies bequeathed are payable, proves insufficient for the payment of his debts, for which it is liable, and such legacies have been paid, the legatees in general are bound to refund their legacies or such rateable part thereof as will be sufficient to satisfy such unpaid debts. (6 *Bac. Abr. Ed.* 1844, *tit. Legacies, H.* 298.)

By 2 R. S. 451, § 26, provision is made for actions by creditors of any deceased persons to recover the value of any assets that may have been paid by an executor or administrator to any legatees of their testator, against *all* of such legatees jointly or against any single legatee separately, on the ground of a deficiency of assets to satisfy the debts of the testator.

The statute (2 R. S. 452, § 32) makes the heirs of every person who shall have died intestate and the heirs and devisees of any person who shall have died after the making of his last will and testament, respectively liable for the debts of such person arising by simple contract or by specialty to the extent of the *estate interest* and right in the real estate which shall have descended to them from, or been devised to them by, such person.

By the 2 R. S. 454, § 42, 456, § 60, all the heirs or all the devisees of the testator, when the latter are liable for his debts, are required to be sued *jointly* in a court of *equity*, but should not be liable to any suit in a *court of law*.

So far as this provision applied to heirs, was changed by the statute of 1837, (*ch.* 460, § 73,) which provided that they might be sued *jointly* and not separately in a court of *law* or *equity*, and the 42d section above referred to was repealed by § 74 of the act of 1837.

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The foundation of the complainant's claim arises upon an alleged subsisting debt, due to him from J. Boyer, the testator, and according to his own showing he must make title to recover, if at all, against the defendants, as *legatees* or *devisees* of the testator. In either case it is obvious that the objection of want of parties is well taken. If the claim is against them as *legatees*, it is seen that all of the legatees are not *jointly* sued, or any single legatee separately. If the claim is against them as *devisees*, the case shows that *all* of the devisees are not made parties, which, I think, under the provisions of the statute, is fatal.

But as it was strenuously urged on the argument, that if there was no other objection, exercising a proper discretion under the circumstances, the court of chancery should have allowed the cause to stand over and proper parties to be brought in, I will proceed to see whether a case upon the merits has been stated in the bill provided proper parties were in. The relief to which the complainant supposes himself entitled, as appears by the prayer of his bill, is either, that the defendants should be decreed to desist from selling under the decree in favor of Gates and wife, Beard and wife, and Susannah Van Derin, made 22d September, 1838, the premises devised to Samuel Boyer, and quiet his title thereto under his purchase at the sheriff's sale; or that the defendants should be decreed to pay his judgment, together with interest and costs, and the surplus of the bid over and above that judgment and costs; and that such claim should be decreed to be a prior lien upon the premises devised to Samuel Boyer to the lien of Gates and wife, Beard and wife, and Susannah Van Derin; and that when a sale should be made of said premises upon that decree, the complainant's claims should be first paid. I am unable to discover any principle upon which such claim as set forth in the bill can be sustained against the defendants, Gates and wife, Beard and wife, and Van Derin. I do not see that the complainant has shown that he has acquired any title whatever to the premises, legal or equitable, under his judgment.

Conceding that his judgment was a lien upon the lands of Samuel and Philip Boyer at the time of its docket, and that is

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as much, and I think more, than can be claimed for it, they did not then own or have any interest in the land in question. It is shown that Samuel conveyed to Philip these lands on the 20th day of January, 1830, and that Philip conveyed the same to Poultney and Ellicott on the 15th day of August, 1832, upon the consideration mentioned in the deeds, which are not attempted to be impeached for fraud or otherwise by the complainant; and the suit in which the judgment was rendered was not commenced until July, 1833. But it is said that it is not averred or proved that the purchasers from Samuel Boyer were *bona fide* for a good consideration and without notice.

- The answer is, as against a purchase under a judgment against Samuel and Philip Boyer as executors, or as against them generally, the prior conveyance is presumed to have been fairly made upon the consideration expressed in the conveyance, and *bona fide*. If it is claimed to be fraudulent, the burden of showing it lies with the other side.

The argument seems to have proceeded upon the ground that this judgment was recovered against Samuel and Philip Boyer as *heirs* or *devisees* of the testator, and that the land sold and purchased by the complainant under it had descended from or been devised to them by the testator. If the judgment was such, the land of the heir or devisee, descended from, or devised by the testator, would be subject to be sold; and on a sale the purchaser would acquire a valid title, although it had been previously aliened by the heir or devisee, unless such alienation had been made in *good faith* before the commencement of the suit; and the purchaser, in order to show a good title against the purchaser under such judgment, would be under the necessity of showing that the heir or devisee had so aliened it in *good faith*.

In the second place, I see no ground on which the complainant has made by his bill a valid claim against the defendants, Gates and wife, Beard and wife, and Van Derin, or either of them, to be decreed payment of his debt. Under no circumstances could he maintain his claim or any part of it as against them, unless he presented a case showing either that they are legatees and had been paid their legacies or some part thereof

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out of the personal estate, and that no assets had been delivered by the executor or administrator of the deceased to his next of kin; or that the value of such assets had been recovered by some other creditor; or that such assets were not sufficient to satisfy his demand, (2 R. S. 452, § 27;) or that they are the heirs or devisees of Jonathan Boyer, and that some *estate interest* and right in the real estate of the deceased had descended from or been devised by him to them; and that the personal assets of the deceased were not sufficient to pay and discharge his debts; or that, after due proceedings before the proper surrogate's court and at law, he had been unable to collect his debts or some part thereof from the personal representatives of the deceased, or from his next of kin or legatees. (2 R. S. 452, §§ 33, 36, 456, §§ 59, 60; *Butts v. Genung*, 5 Paige R. 254.)

The complainant has failed to show by his bill, if he claims to recover against them as legatees strictly, that the defendants, Gates and wife, Beard and wife, and Van Derin, or either of them, had ever been paid any portion of their legacies.

If he claims against them as heirs, and as such, if it be conceded that he has shown that some *estate interest* and *right* in the real estate descended to them from the testator, he has omitted to show or allege that the personal assets of the deceased were not sufficient originally to pay and discharge his debts, or that after due proceedings before the proper surrogate's court, and at law, he had been unable to collect his debt or some part thereof from the personal representatives of the deceased or from his next of kin or legatees. (2 R. S. 452, § 33.) Or if he claims against them as *devisees*, he has omitted to allege or show that the personal assets of the testator, and the real estate which descended to his heirs, were insufficient to discharge his debt; or that, after due proceedings before the proper surrogate's court, and at law, he had been unable to recover such debt or some part thereof, from the personal representatives of the testator, or from his next of kin or legatees, or from his heirs. Such allegations were necessary, without which no cause of complaint appears by the bill against them. (2 R. S. 452, § 33, 455, § 56; *Schermerhorn v. Barhydt*, 9 Paige R. 28.)

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It seems to me, therefore, that in whatever character complainant claims against Gates and wife, Beard and wife, and Van Derin, whether as legatees, heirs, or devisees, conceding to them the character of one or the other, he has failed to make such allegations, without which being made and proved or admitted, he does not show a case subjecting them to the payment of his debt or any part thereof.

The bill merely states that the testator, at the time of his death, was possessed of considerable personal estate, but without alleging that it was not sufficient to pay his debts. For aught that appears by the bill, the personal estate of the testator was sufficient to have paid all his debts, if it had been applied to that purpose by his executors. The devisees of the real estate or of any interest or rights therein can not be subject to contribute any thing for the payment of debts until it is shown that the complainant has taken all proper steps to obtain satisfaction from the executors, or from the legatees of the personal estate, if it has been paid over to them leaving debts unpaid, or from the real estate, if any, descended to his heirs.

I agree with the chancellor, that the issuing of the execution upon the judgment recovered against the executors did not exhaust the remedy against them, for the personal estate which had come to their hands and had been misapplied by them. For under that execution, the sheriff could only levy the demand out of the personal property which still remained in their hands, and which was the proper subject of sale on execution. The return of such execution unsatisfied, therefore, was no evidence that there was not in fact sufficient personal assets originally, or even then, to satisfy the judgment, or that the debt or demand could not be recovered from the executors personally, if the complainant had taken the proper steps to call them to account before the surrogate. And conceding that the interest of the legatees in the real estate, their legacies being liens thereon, could be reached in any way, they clearly can not be until the complainant has proceeded against the surviving executor personally for the satisfaction of his demand.

It was however insisted on the argument that the defendants

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could not raise the objection that the testator's personal assets were not exhausted, on the ground that their proceedings to enforce their lien upon the real estate, to satisfy their legacies, was an admission of a deficiency of assets of the testator, and that they had been duly applied in the course of administration.

I think there are at least two conclusive answers to such objection. One is, if the legatees had gone against the executors for payment of their legacies, conceding that the surplus of the personal assets over and above sufficient to satisfy all the debts of the testator chargeable upon them could properly be appropriated to satisfy the legacies, *non constat* that they did, and that the personal assets of the testator were claimed by the executors to be retained by them equal in amount with the complainant's debt, on the grounds of its existence and being outstanding.

The other is, the defendant's bill, in the first suit, expressly alleges that the personal assets of the testator which came to the hands of the executors were more than sufficient to pay all his debts, which fact is admitted by the complainant in his answer or stipulation in that suit.

It is not perhaps very material in the decision of this case to express an opinion as to the effect of the judgment obtained by the complainant against S. and P. Boyer, as executors of their testator. But as it was strongly urged that the complainant acquired a valid title to the premises in question upon the sale and conveyance under it, as against the defendants, it may be well enough to give an opinion upon that point.

That judgment was rendered against the defendants therein as executors for \$1,459,16 damages and \$41,16 for costs, to be levied of the goods and chattels which were of the testator at the time of his death in their hands to be administered, if they had so much thereof in their hands to be administered, and if they had not so much in their hands to be administered, then \$41,16, parcel of the damages aforesaid, being for the costs and charges aforesaid, to be *levied* of the proper goods and chattels of said Samuel and Philip Boyer. This is in conformity to the English practice as formerly pursued in the entry of such judg-

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ments, and by its terms was not a lien upon the lands, even of the defendants, for any portion of the recovery. (*Lansing v. Lansing*, 18 *John. R.* 502.)

If there had been a further direction, which is warranted by our statutes on a proper application to the court, to wit: "and if sufficient goods and chattels of the executors can not be found, &c., that then the said \$41,16 be made of the real estate of the executors," the judgment for that amount would have been a lien upon the lands of the executors; but as it was rendered only against their goods and chattels, in my opinion it never was a lien upon any real estate.

It is evident from the whole tenor of the will, that the testator intended to charge his son Philip with the payment of the legacies bequeathed to his daughter Betsey, and his son Samuel, with the payment of the several legacies bequeathed to his four daughters Polly, Susannah, Mary, and Catharine, in case of their acceptance of the devises, in consideration of the lands so devised to them respectively in aid of the personalty. That being so, it is well settled that such real estate is in equity chargeable with the payment of those legacies. (*Harris v. Fly*, 7 *Paige R.* 421.) It is plain that the daughters of the testator, who have legacies bequeathed to them, to be paid by his two sons in consideration of the devise of the real estate to them and the representatives of those who are deceased, if liable at all for the payment of the complainant's debt, can only be subjected to the payment upon the ground that their legacies are interests in the real estate so devised to Philip and Samuel to the extent of the value thereof, and equitable charges upon the lands so devised. I am inclined to the opinion that such legacies are interests in such real estate, which under a proper state of facts would subject them to the payment of the debts of the testator to the extent mentioned, although the devisees charged with the payment of the legacies may have aliened *their* interests in the estate in good faith before the commencement of a suit by a creditor for the recovery of such debt. The interests of the legatees in the land would remain unaffected by such conveyance. But it is not necessary to decide that question in this case, as I think I have shown that the bill is not so framed

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as to charge any of the daughters on the ground of having such interests.

I agree with the chancellor, that there was enough in the pleadings and proofs to entitle the complainant to the decree made against S. Boyer. Several other questions were made on the argument; among them the defendants insisted that the complainant's debt was barred by the statute of limitations. Having come to the conclusion that there is no error in the decree of the chancellor, I do not deem it necessary to give an opinion upon any other question made. The decree should be affirmed.

DECISION.—Decree affirmed, unanimous.

NOTE.—*Held*, that *personal estate* is first liable, at law and in equity, for the payment of the *debts* of a testator. The *real estate*, in case of insufficient personal estate, is next liable, except such as is expressly charged with the payment of debts.

Where legacies are made payable and have been paid out of the personal estate, the legatees, in general, are bound to *refund* where the personal estate proves insufficient to pay the debts.

In this case the complainant, by his bill, must make title, if at all, against the defendants as *legatees* or *devisees* of the testator. Not having *jointly* sued *all* of the *legatees*, or any single legatee separately, and not having made *all* of the *devisees* parties, under the provisions of the statute, there is a fatal defect of *parties*.

As against a purchaser under a judgment against Samuel and Philip Boyer as executors, or as against them generally, the *prior conveyance* (to Poultney and Ellicott) is presumed to have been fairly made upon the consideration expressed in it. If it is claimed to be fraudulent, the burden of showing it is with the other side.

If the judgment had been recovered against Samuel and Philip Boyer as *heirs* or *devisees*, and the land sold under it had descended from or been devised to them by the testator, then a prior *bona fide purchaser* to the judgment would be bound to show that the heir or devisee had aliened the land in *good faith*.

If the complainant claims to recover against Gates and wife, Beard and wife, and Van Derin, as *legatees*, he has failed to show, by his bill, that either of them have ever been paid any portion of their legacies.

If he claims to recover against them as *heirs*, he has omitted to allege that the personal assets of the deceased were not sufficient originally to pay his debts, or that all the proper proceedings and remedies before the surrogate, and at law, had been instituted against the personal representatives, and exhausted.

And if he claims against them as *devisees*, he has omitted to allege or show, that the personal assets of the testator, and the real estate which descended to his heirs, were insufficient to discharge his debts, or after proceedings against the personal representatives, next of kin, legatees, or heirs-at-law, before the surrogate and at law, he had been unable to recover the debt or some part thereof.

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The issuing of the execution upon the judgment recovered against the executors, and its return unsatisfied, was no evidence that there was not in fact sufficient personal assets originally, or even then, to satisfy the judgment, or that the debt or demand could not be recovered from the executors personally, if the proper steps to call them to account were instituted.

The complainant's judgment being against the defendants as executors, and the amount thereof to be levied of the goods and chattels which were of the testator at the time of his death in their hands to be administered, and if they had not so much in their hands to be administered, then the amount of costs and charges to be *levied* of the proper goods and chattels of the executors personally, it never was a *lien* upon any *real estate*.

There was enough in the pleadings and proofs to entitle the complainant to the decree made by the chancellor against S. Boyer.

Not reported in this court.

HOES AND WIFE, AND HAGER AND WIFE, appellants, *agt.* VAN HOESEN, respondent.

Questions discussed.

1. Where the testator devised and bequeathed all of his farm of land, with all thereto belonging, with his house, barn, &c., to his two sons, John and George, their heirs and assigns forever, share and share alike, with all of his farming utensils, and also all his stock of whatever nature then on his farm; to his son Lambert, he bequeathed \$3,000, to be paid within one year after his decease, by his two sons, John and George; to each of his three daughters, Mary, (called Dorothe,) Anna and Jane, he bequeathed the sum of \$700, also to be paid by his said two sons, John and George, as they severally should become of age; to his wife, Dorothe, he gave the use and income of all his estate during her widowhood, and there being personal property amounting to nearly \$6,000, not specifically disposed of by the will.

Whether, after the death of the widow, the appellants, as heirs at law, were entitled to an account of the reversionary interest in that part of the personal estate not specifically bequeathed to the two sons, John and George, and payment of their shares therein as next of kin of the testator?

2. Whether by the construction of the will, the legacies (to the four children) were to be paid by the devisees *personally* on account of the devise of the *real estate* to them, or whether the reversionary interest in the *personal estate* not specifically bequeathed, was the primary fund for their payment, and which the devisees were authorized thus to appropriate?

3. Whether releases each for \$700 executed by the appellants, (Mary and

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Anna,) for their legacies under the will, precluded them from claiming, as heirs at law, their share in the reversionary interest of the personal estate not specifically bequeathed?

The bill in this cause was filed before the vice chancellor of the third circuit, on or about March 17, 1839, by the above named complainants against the above named defendant.

The answer of the defendant was put in May 30, 1839, and a replication filed thereto, on or about June 18, 1839.

An order to produce witnesses was entered, on or about Aug. 11, 1840, and an order to close the proofs, on or about the day of Nov. 1840.

No proofs being taken, the cause stood for hearing before said vice chancellor upon the pleadings.

The bill set forth as in the abstract of bill and answer hereto annexed.

The answer admitted and denied, &c., as in said abstract hereto annexed.

The replication to said answer was general, in the usual form.

The cause was argued June 15th, 1841, before Hon. JOHN P. CUSHMAN, then vice chancellor of the third circuit.

On the 28th day of October, 1842, a decree was entered upon the decision of said vice chancellor, from which decree the defendant duly appealed to his honor, the chancellor.

The bill states, that Matthew Van Hoesen, having a large real and personal estate, on the 17th September, 1817, made his will, devising to his sons *John* and *George* his farm, and all belonging to it, in equal portions, together with the farming utensils and stock; to *Lambert*, \$3,000, payable in one year after testator's death, by John and George; to *Dorothy, Anna, and Jane*, \$700 each, payable when they became of age, by John and George.

Testator's wife, *Dorothe*, to enjoy the use and income of all the estate during widowhood. Testator's wife *Dorothy*, appointed executrix, and John and George executors. (*Fol.* 1, 2, 3.)

Answer.—The testator died September 17, 1817. (*Fol.* 2.)

That at the time of his death he was seized of a farm of

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about 190 acres, worth not over \$45 to \$50 an acre. The will was made the day of, and shortly before his death. Copy of will set forth in schedule A, nearly corresponding with that in the bill. (*Fol.* 9.)

Bill.—Matthew Van Hoesen left only six children, viz., John M., Lambert, George, Jane, Mary, and Anna. (*Fol.* 4.)

Answer.—Admitted. (*Fol.* 10.) The daughters were Maria, (called Mary in the bill,) Annatje, (in English Hannah, but called Anna in the bill,) and Jane.

Bill.—That said Mary Van Hoesen was misnamed “Dorothy” in said will, and the executors have regarded it as a mistake, and have paid her \$700 accordingly. (*Fol.* 4, 5.)

Answer.—That defendant has no knowledge as to this, except from what appears on the face of the will, and from the fact of their being daughters of the testator. Defendant paid them the \$700 each, upon their executing releases, and not otherwise. Has regarded Maria Hoes as having been named Dorothy, so far as to pay the legacy under the circumstances in said answer thereafter detailed, and no further. (*Fol.* 10, 11, 12.)

Bill.—That the testator had a large personal estate, and especially the goods, credits, &c., mentioned in schedule A, which is a copy of an inventory filed by the executors in the surrogate’s office, Sept. 3, 1818. (*Fol.* 6, 7.)

Answer. Testator’s personal estate was truly stated in said inventory, except in some trifling particulars minutely disclosed in the answer. (*Fol.* 3–7.)

Bill.—That the testator had other goods, demands, &c., not set forth in the inventory, (of which a discovery is prayed.) And that the testator owed no debts, or if any, to a very small amount; and if the executors have paid any debts with the personal property, very little has been so paid. (*Fol.* 7, 8.)

Answer.—There were some articles of furniture not inventoried, because the widow claimed them, and all the heirs assented to such claim. All of said articles (except some of little value, not worth altogether over \$20 to \$40, and a looking-glass, inventoried at \$20, which remain on the premises)

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were, after the widow's death, divided among the children, and the complainants had their full share. (*Fol.* 7, 9.)

The testator owed but little. Defendant paid funeral expenses and debts, as set forth in schedule B.

Bill.—That by the will, the use of all the personal property belonged to the widow, and after her death belonged to the children generally, except the farm, stock, and utensils. (*Fol.* 8, 9.)

Answer.—(*Fol.* 13.) By a strict construction of the will, the widow was entitled to the use and income of the whole estate, real and personal, so long as she remained his widow. She remained his widow until she died, June 10th, 1834. Defendant submits to the court, whether, under the circumstances, the personal property belonged to the children as distributees; but is advised said personal property, in equity, does not belong to the children, as heirs at law. The legacies were payable out of the personal property, and the executors could not be compelled to pay them till the widow's death.

Bill.—That Jane Van Hoesen died in July, 1838. The other five children still survive. (*Fol.* 9.)

Answer.—Admits she died July 15, 1838, and that the others still survive. (*Fol.* 17.)

Bill.—That Dorothy Van Hoesen, the widow, died in June, 1834, without having again intermarried. (*Fol.* 10.)

Answer.—Admitted. (*Fol.* 14.)

Bill.—That John M. Van Hoesen and Goerge Van Hoesen, (testator's brother,) qualified as executors—Dorothy, the widow, did not. George died in 1822, leaving John M. sole executor. (*Fol.* 10, 11.)

Answer.—Admitted. (*Fol.* 17.) The widow renounced.

Bill.—That John M. Van Hoesen never delivered any portion of the personal property to the widow, but always used it as his own, under pretence that he did own it. (*Fol.* 11, 12.)

Answer.—Defendant worked for his father till about twenty-seven years of age, without pay, and aided much in acquiring the property. The other children did much less, and defendant ought to have had a larger portion. At testator's death, George

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Van Hoesen was about sixteen years old. Neither he nor defendant had any property of any consequence. Defendant is advised, and believes, that by the will, the widow had the exclusive right to the use of all the estate until her death or re-marriage. She was a healthy woman, about forty-eight years of age. (*Fol.* 18, 21.)

Bill.—That shortly after testator's death, John M. collected the debts, &c., or sold them, or turned them out in payment of demands against him. Believe he delivered a part of them to Lambert, in payment of his legacy of \$3,000, about the time said legacy became due. The whole of said legacy was paid out of testator's personal estate, and that the widow never had or received any portion of the income of said personal property, but that John M. applied the entire proceeds thereof to his own use.

Answer.—That testator fell sick on Monday, was considered dangerously ill Tuesday, and died Wednesday afternoon. Nicholas Kittle, an ignorant and unskilled man in such matters, was called on to draw the will, a few hours before testator died, and when he was too weak to ascertain whether it conformed to his directions or not. Defendant understood from his mother that testator directed Kittle to draw the will so as to give the farm, &c., to defendant and George, subject to a life estate to the widow, and the legacies to be paid out of the personal property—it not being so drawn was through Kittle's ignorance. Defendant submits that such should be the construction. (*Fol.* 21, 25.) It was well understood that he meant to give the farm to John and George, and the money to Lambert and the girls. (*Fol.* 25, 26.)

Bill.—The legacies to the daughters were also paid by John M. out of the avails of testator's personal estate, although a charge upon him and his brother George personally. (*Fol.* 16.)

Answer.—Admitted. (*Fol.* 49, 50.)

Bill.—Dorothy Van Hoesen, the widow, was entitled to the use of all the personal property during her life. The income of the real estate was more than sufficient to support the widow. John M. did not deliver the goods, credits, &c., to the widow,

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but shortly after her death disposed of them, or appropriated them to his own use. (*Fol.* 17, 18.)

Answer.—Admits that defendant did not deliver to the widow the goods, chattels, &c., but retained the same to pay the legacies and claims, debts and funeral expenses of testator, upon an agreement made with the widow. (*Fol.* 49, 50.) Defendant cannot state with accuracy whether the use and income of real estate were more than sufficient to support the widow and her minor children, whom she supported; but to the best of knowledge and belief, were not more than sufficient to support said widow and her children comfortably, as supported by defendant. (*Fol.* 51, 52.)

That shortly after death of testator, defendant made an agreement with the widow, by which he took possession of the farm, together with the stock, farming utensils and other goods, and chattels undisposed of, as before mentioned, and used, occupied and enjoyed the same for his own benefit and that of his brother George, until 1825, when defendant bought George out; and as a compensation to the widow therefor, supported and maintained her during her life with every necessary and comfort, and provided for her minor children during their minority, and, as he believes, to the widow's entire satisfaction. (*Fol.* 52, 53.) That he paid for her physician's bills to an amount not less than \$639, she having within a few years after testator's death become infirm and afflicted with frequent illness. That he permitted the widow to use the dwelling-house of which testator died seized, to receive and entertain her friends, with entire freedom and uncontrol, as if she had been sole owner of said real estate, goods, &c. And that defendant being unmarried, boarded and resided with her as a member of the family. (*Fol.* 54, 55.)

Bill.—After the marriage of Hoes with Mary, and before the death of the widow, from ten to eighteen years ago, defendant paid to Hoes and wife \$700, with interest, in satisfaction of Mary's legacy, for which a receipt was given by Hoes and wife, or one of them. No more than was due upon the legacy was paid when the receipt was given. Intended to give a receipt for the legacy, and nothing more. They understand defendant

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pretends said receipt cuts off complainants' claim to any share of testator's personal estate. If said receipt purports to cover anything but the legacy, it is false and fraudulent, and should be no bar in equity. (*Fol.* 18, 19, 20, 21, 22.)

Answer.—That defendant paid said legacy of \$700 to Maria, who was then twenty-four years of age, and unmarried, and who agreed to receive the same, and executed to defendant and his brother George, and the executors, a full release of all claims upon real and personal estate of the testator; said release dated Dec. 26, 1818, and is contained in schedule C, (*Fol.* 38, 39, 40;) that defendant gave her his note for \$700, and paid same to Hoes after his marriage, except a small portion, which he paid to her, (*Fol.* 40;) denies that release was fraudulent, &c., (*Fol.* 37,) and insists that same is binding. (*Fol.* 55.)

Bill.—Hoes and wife had never seen the will when the receipt was executed. The will was in possession of defendant, who knew the contents and legal effect thereof; and that Hoes and wife, after the widow's death, would be entitled to one-sixth of the personal estate of the testator. Complainants believe defendant had been so advised, and knew or suspected complainants were ignorant of it; believe that if said receipt covers anything but the legacy, defendant prepared the same with the knowledge that complainants would be entitled to a share of the personal estate, after death of the widow, and supposing complainants to be ignorant that such was the legal effect of the will. (*Fol.* 23, 24, 25, 26.)

Answer.—That the will was opened six weeks after testator's death, and read in presence of all the family, audibly. In March after, proved and recorded, and will returned to defendant. Denies positively, that he has ever misrepresented contents, or done anything to prevent or divert complainants from going to the record to see contents, or that he has ever declined giving them free access to the original. Admits he became acquainted with contents when will was opened and read, but did not, nor does he now know, what would be the legal construction. Denies that he suspected they were ignorant of the contents when the releases were executed. (*Fol.* 26, 31.) Vanderpoel and others advised him, as friends, that will did not

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clearly express testator's intention; there might be trouble, and advised him to get a release. (*Fol.* 31, 33.) Denies he supposed they would hold the personal property after widow's death, except what he derived from the advice of Vanderpoel and others. Admits complainants did not, probably, know of such advice, and that, probably, they did not know whether they would be entitled to a distribution after widow's death or not; but has no doubt they knew what had been the intention of the testator; and that they were then willing to carry it into effect; and that they executed the releases with a full knowledge of their contents for that purpose. (*Fol.* 33, 36.) Expressly denies any art, stratagem, or device, or misrepresentation or fraud, but says, mutual liberality and good feeling induced the widow to relinquish, and the settlement to take place. (*Fol.* 36, 41.) Releases were executed, with full knowledge of their contents, and of their rights, or with means of knowing their rights, and without fraud or misrepresentation on his part. (*Fol.* 42, 45.) Denies that he made, or was called on to make, any representation one way or the other. (*Fol.* 45.)

Bill.—The same statements and charges as are above made with respect to the legacy to Mary, are repeated with respect to the legacy to Anna. (*Fol.* 26-34.)

Answer.—The same statements and denials are made with reference to legacy to Anna as to Mary, except that the legacy to Anna was paid to complainant, Hager, after his marriage with Anna, who executed the release. (*Fol.* 41, 42.)

Bill.—Hoes and wife believe and charge, that they are entitled to one-sixth of all the personal estate of the testator, (except the stock and farming utensils,) with interest upon the same from testator's death, or since the defendant converted the same to his own use. (*Fol.* 34, 35.)

Answer.—Insists the release is binding, and that they are entitled to nothing. (*Fol.* 55, &c.)

Bill.—Hager and wife make the same statement. (*Fol.* 36, 37.)

Answer.—Insists upon release, &c. (*Fol.* 55, &c.)

The vice chancellor decreed that the complainants were each entitled, as distributees, to one-sixth part of the personal prop-

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erty which was bequeathed to the widow, and which the defendant, as executor, should obtain and distribute.

The defendant appealed to the chancellor, and on the 24th of April, 1846, the chancellor made a decree, by which the decree of the vice chancellor was reversed, and the complainants' bill dismissed with costs.


From that decree the complainants appealed to this court.

Miller and Hogeboom, Attorneys and

Henry Hogeboom, Counsel for appellants.

First. The testator, Matthew Van Hoesen, not having disposed of his personal property, (except his farming utensils and stock on his farm,) by his last will and testament, the same passed by the laws of intestacy to his widow and next of kin. The female complainants being two of the six children of the testator, are, with their husbands, therefore entitled to their proper proportion thereof.

The respondent, John M. Van Hoesen, being the sole surviving executor of said will, and having possessed himself of that property, and used and enjoyed it for his sole benefit, is answerable for it, and liable to account in this suit to the complainants for their proper proportion thereof. (1 *Barb.* 396, *opinion of chancellor*; 6 *Ves.* 571; 19 *id.* 494, *general rules.*)

 No residuary clause—and with exception of stock on farm, and interest of widow, no disposition of personal property—bill filed for account of personal distributive shares. *Dorothy* in the will means *Mary*. Bill of two, claims two-sixths, being two of six children—so V. C. decided—that chancellor reversed. Held, if on construction right, still only entitled to two-thirds of two-sixths, as one-third went to the widow—that we think was correct. And we only ask now a modification so as to give us two-thirds of two-sixths.

Widow died in 1834—bill filed in 1839—Jane died in 1838—five children then left. Testator died Sept. 1817—widow proved will—also George and John—brother George died in 1822—bill against John, surviving executor.

Defence, that personal estate should be applied to the pay-

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ment of the legacies—and no more than enough to pay—we say there would be a surplus.

Another answer—that Mary, (Maria or Dorothy,) prior to her marriage, released her legacy, and all claim on the estate—and so she and her husband were barred—also that Adam Hager, after marriage, released all the right of his wife—bill charges releases void, except as to the legacies.

Bill charges and answer admits only \$700 paid, and so *no consideration* beyond legacy. (1 C. 121; 13 J. 87.) Void, when *without a seal*. Then (2 R. S. 406, § 96) statute opens way to inquire into consideration—and want of consideration makes void. One dollar mentioned in release merely nominal. (9 Mass. 235; 4 B. and P. 113.)

Suppressio veri—parties ignorant of their rights—defendant, *cestui que trust*, should have informed them—show all knowledge they had of facts—(p. 35)—will read to family—36-7, what defendant knew—release of Hager, given before death of widow, and don't cover subsequently acquired interest.

(*Clancy H. and W.* 3-10; 9 P. 283.) Husband could not then reduce to possession. 🖱️

Second. The legacies to the children, Lambert, Dorothy, Hannah and Jane, were not payable out of the personal estate, but by the devisees, John and George. They are not payable by the executors, but by the devisees personally, and evidently on account of the devise of the real estate.

Although the personal estate is generally the primary fund for the payment of legacies, as well as of debts, yet if there be an express direction, that they be otherwise paid, or if from the scope and tenor of the will the testator's intent may be fairly inferred to be otherwise, then such intent will prevail, and the testator's personal estate be exonerated.

Again, assuming that the legacies are to be paid out of the personal property, the chancellor, instead of dismissing the bill, should have directed an account of the personal property to be taken, to ascertain whether the debts and legacies would exhaust it. (*Kelsey v. Deyo*, 3 Cow. Rep. 133, 141; *Harris v. Fly*, 7 Paige, 421, 425; *Burton v. Knowlton*, 3 Ves. 106, 113;

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Watson v. Buckwood, 9 *Ves.* 456; *Webb v. Jones*, 2 *Br. Ch. Cas.* 60; 18 *W.* 200.)

Third. The release of Hoes's wife, before her marriage, and that of Hager after his marriage, discharged nothing but the \$700 legacies.

The \$700 was all that was received, and the releases should therefore be limited to that sum. They were intended to cover nothing more, and it would therefore be inequitable and unjust to give them a more comprehensive operation. If Van Hoesen designed to embrace in them something more, it was an unconscientious and fraudulent act on his part, which should not be permitted to prevail.

The release of Hager was inoperative and void as to any thing beyond the \$700, as he could not discharge any thing belonging to his wife, beyond a vested interest in possession. This was not such an interest. (*Jackson v. Stackhouse*, 1 *Cow.* 126; *McIntyre v. Clark*, 1 *Edw. Ch. Rep.* 34; *Cole v. Knight*, 3 *Mod.* 277; 1 *Show.* 150, *S. C.*; 2 *Saund. Plead. and Ev.* 320; *Ramsdell v. Hylton*, 2 *Ves. Sen.* 310; *Salkeld v. Vernon*, 1 *Eden's Rep.* 64; *Jarvis v. Drake*, 1 *Vern.* 19; *Gee v. Spencer*, 1 *Vern.* 32.)

REPLY. (6 *C.* 333; 1 *Roper Leg.* 485-40, 41; *I.* 38, 39; 1 *Roper*, 166-7; 4 *Mad.* 148. ❧)

HOGEBROOM & MILLER, *Solicitors.*

H. HOGEBROOM, *of Counsel for Appellants.*

Edward Clark, Attorney, and

Ambrose L. Jordan, Counsel for respondent.

First. The releases from the appellants to the respondent, set forth in the answer, were obtained by the respondent in good faith, and are a bar to the complainants' recovery.


Second. The legacies were not expressly charged on the real, in exoneration of the personal estate, nor can any plain intent to that effect be gathered from the terms of the will. The personal property, therefore, was the primary fund for the payment of the legacies, and was rightfully appropriated by the executors (after obtaining the widow's consent) to that use.


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(*Ancaster v. Mayer and others*, 1 Bro. C. 460, 463; *Watson v. Buckwood*, 9 Ves. 448; *Tait v. Lord Northwick*, 4 Ves. 816; *Livingston v. Newkirk*, 3 Johns. Ch. 319; 2 *Atkyns*, 434; 3 P. Wms. 364; *Kelsey v. Deyoe*, 3 Cow. 133; *Tole v. Hardy*, 6 Cow. 333; 8 Conn. 5; 5 Conn. 536; 6 Rand. 587.)

Third. The decree of the chancellor should be affirmed, with costs.

A. L. JORDAN, of Counsel for respondent.

 Personal estate, besides farming utensils, &c., given to two sons, about \$4,300.

Testator made no provision for payment of legacies. Widow lived seventeen years—and she had whole estate—sons had no property, so far as appears—family congress—mother agreed to give up her right. Defendant paid her a consideration—agreed to support her for life. Daughters agreed to take their legacies out of the personal property. Defendant supported his mother—paid doctor's bills, &c. Releases good answer—and clearly, personal property was the primary fund. 

DECISION.—Decree affirmed. Unanimous.

JEWETT, Ch. J., delivered the opinion of the court.

NOTE. *Held*, that the personal estate of the testator is deemed the natural and primary fund to be first applied in discharge of his personal debts and general legacies, and the testator is presumed to act upon this legal doctrine, until he shows some other distinct and unequivocal intention.

It seems from the will, that it was the intention of the testator that the devise and bequest to the two sons, with directions to them to pay, should be in *aid* of the reversionary interest in the personal estate undisposed of by the will, and that that interest should be the primary fund for the payment of the legacies.

The mere making a provision for the payment of debts or legacies out of the real estate does not discharge the personalty. There must be an intention not only to charge the realty, but to *exonerate* the personalty.

The decree affirmed upon this point alone.

Reported, 1 Comstock, 120.

HOWLAND Appellant, *agt.* AYRES AND OTHERS.*Questions discussed.*

1. Whether the *power of attorney* executed by Charles Green, a judgment creditor claiming surplus funds in this cause, to his brother Walter C. Green, was in form and terms sufficient to authorize the latter to make an *assignment* of the judgment of Charles Green, or to make an accord and satisfaction as to the judgment, and the claims of Charles Green on the surplus funds in court?

This cause came before Murray Hoffman, Esq., (then) assistant vice chancellor of the first circuit, upon exceptions to a master's report, as to the rights of the claimants in the surplus moneys paid into court by the master, arising from the sale of the mortgaged premises by him, under a decree of foreclosure.

The master reported that the claimant, Charles Green, was entitled to be paid out of such surplus the sum of \$484,03, the amount due to him upon the judgment recovered by him in the superior court of the city of New-York, against Hezekiah Kelly and Horace D. Forbes, docketed on the 14th day of July, 1832, as a lien thereon.

Henry W. Brentnall excepted to the report; and so, also, did Lewis Decasse and Pierre A. Miede. The assistant vice chancellor allowed the exception of the latter, and ordered that the whole of the fund then in court, amounting to \$498,91, be applied to the payment of a judgment in their favor, against Hezekiah Kelly and Horace D. Forbes, provided they first paid the sum of twenty-five dollars to said Brentnall's solicitor. From this order Green appealed to the chancellor, who affirmed the same. And hence his appeal to this court.

The testimony of *Walter C. Green*, the attorney, taken before the master, is considered to be necessary to an intelligent understanding of the ground set up by Charles Green that his brother had no authority to make the assignment or settlement of the judgment in question; because, he claimed that although the power of attorney might be considered as general in one sense, that is, a general power to do all acts in a *particular business*, it did not give him authority to do any acts out of that particular business, such as to assign judgments.

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Walter C. Green, a witness, produced, sworn, and examined, on the part of Henry W. Brentnall, deposes as follows :

I am the brother of Charles Green. I know nothing of the judgment obtained by the said Charles Green against Hezekiah Kelly and Horace D. Forbes, except that I have a vague impression of such a judgment having been rendered, which impression was derived from information received from the said Forbes. I signed the paper now produced, and marked as Exhibit No. 7, though my impression is, that the name of Henry W. Brentnall, in the second line of said paper, was not then filled in in the said paper, but that a blank was left for a name in that place.

Question. Will you please to state the circumstances under which that paper was signed ?

Answer. I had been in the habit of receiving propositions of persons indebted to my brother, Charles Green, as to the settlement of them, which propositions I was in the habit of communicating to my brother. I had in this way, at several different times, received propositions from Horace D. Forbes, who represented that he was entirely insolvent. Three different representations I communicated to my brother, who declined from time to time to accept such propositions, stating, that the defendants were young men, and that he should be able to get something from Forbes, whose father-in-law was rich. Afterward, Forbes made a proposition to me to pay for the claim, fifty dollars in cash, and to give his note for twenty-seven dollars and thirty-seven cents, payable to the order of Walter C. Green. Thinking it the best that could be done I concluded to accept the proposition, and accordingly did so accept it, but without consulting with my brother or speaking to him on the subject. The money was paid by Mr. Forbes, who at the same time gave his note conformably to his proposal; and I then signed the paper now produced and marked as Exhibit No. 7, at which time, as I think, the name of Henry W. Brentnall was not in the said paper, though I am not sure. The last proposition which Forbes had made, prior to the one finally accepted, had been made about a year before. That proposition so made a year before had been communicated by me to my brother, and he

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declined accepting it. I do not know in whose handwriting the paper is, but Mr. Forbes told me it was written by him. My brother resided in this city. He had retired from business about two years before the signing of that paper. I had a written power of attorney from my brother, which was lodged in the bank, which authorized me to sign checks; and I also had a power of attorney from my brother to transact his custom-house business, which was lodged in the custom-house. I had no other written power.

Q. Did you act generally as your brother's agent, or what agency had you in the management of your brother's concerns?

[Mr. Manning hereupon objects to the question, and to any parol testimony as to the witness's powers, as the attorney of his brother, upon the ground that no evidence is admissible, except of a power under seal, to authorize the execution of the paper in question; but consents that the testimony be taken, subject to his objection, and reserving his right to make his objection to such evidence before the court,—Mr. Manning at the same time requiring the claimant, Mr. Brentnall, to produce a power of attorney under seal.]

A. While my brother was engaged in business some years ago, I was his agent for the transaction of it, and at the time wrote letters and sold goods, endorsed notes and attended to his business generally during his absence, and while he was here or at the store. After my brother retired from business, he had an office in Broad-street, where he had a desk, and where I seldom went to see him.

Q. Did you endorse notes without a written power?

A. I presume not.

Q. Where is the power, if in writing?

A. I do not know, unless it be contained in the power lodged in the bank.

Q. Did you endorse notes of a business kind, not intended for your banking purposes?

A. I might have endorsed notes in the name of my brother for the purpose of exchange, but I am not aware of any such.

Q. Did you contract written engagements for your brother, and in his name?

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A. I do not know that I did ; but if I had done so, they would have been complied with.

Q. Did you buy goods, in your brother's name, on a credit ?

A. Yes, sir.

Q. Who gave the notes ?

A. Probably my brother : merchants understood, generally, that I was transacting business for him. And I do not recollect that I ever gave notes on purchases, and I presume I did not, as I was in the habit of always consulting him. I endorsed notes for my brother for banking purposes, but I do not recollect that I ever gave notes. I was in the habit of always consulting my brother on the purchase of goods, and in transacting the other business.

Q. Were contracts or agreements entered into between merchants and yourself ratified by Charles Green ?

A. Yes, sir. All agreements for the purchase of goods were ratified by him. I made no contracts or agreements, except for the sale or purchase of goods.

Q. Were you a partner of your brother ?

A. No, sir ; I was not.

Q. How came you to be the medium of communication between Mr. Forbes and your brother.

A. For the last two or three years my brother has not been in business, nor have I. I boarded up town, and on coming down to the post-office in the morning I would occasionally meet Mr. Forbes, and as we knew each other personally, he having seen me in my brother's store, we spoke of the claim, I asking him why he did not settle it. He then would tell me a long story of his poverty, and ended by making me an offer. When the last offer was made by him, I considered that my brother would probably do nothing with the claim until it was outlawed ; that it was worth nothing, and being in want of money myself, I concluded to accept it.

[Adjourned to 14th January, 1836, at 11 A. M., at which time Mr. Manning, Mr. Seely, and Mr. Patten attended, and the witness's examination being resumed, he deposed as follows:]

By Mr. Seely—

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Q. At what banks was the power of attorney, from your brother to you, lodged; and in what banks did he keep his accounts?

A. Originally my brother kept his account at the Bank of America. He also kept his account at the Branch Bank of the United States and the Merchants' Bank; also, the Manhattan Bank and the Tradesmen's Bank. He discontinued his accounts at the Bank of America after a short time. There were powers left at all the banks, except, I believe, the Bank of America and Tradesmen's Bank. Powers were left at the Branch Bank, Manhattan, and Merchants' Bank.

Q. How could you transact business at the Bank of America and the Tradesmen's Bank, without having written powers lodged there?

A. My impression is, that I did not draw checks upon those banks; nor transact business there as attorney for my brother.

Q. When was the name of Brentnall first mentioned or communicated to you, as connected with the paper or assignment marked Exhibit No. 7?

A. It might be that Mr. Forbes, when he made out that paper, and handed it to me, may have mentioned the name of Mr. Brentnall, but I have no recollection of it, nor have I any recollection of the name, until I came here and saw it in the assignment.

Q. In the negotiation between yourself and Forbes, that preceded the execution of that assignment, did Mr. Forbes negotiate as for himself and on his own account?

A. It was for his benefit, as I understood, entirely.

Q. Did you ever understand otherwise, until this assignment was exhibited here; and if so, when did you so understand otherwise?

A. When I saw the name of Brentnall here in the assignment was the first I ever heard of it, to the best of my present recollection.

Q. Did Mr. Forbes, since the execution of that assignment, ever speak of it, as a paper of his own, in the hands of Mr. Patten, as his counsel?

A. In a conversation which I had with Mr. Forbes relative

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to this assignment, and in which I told Mr. Forbes that my brother had not assented to it, and that I was willing to return him the fifty dollars which I had received, Mr. Forbes, in reply, said it was a hard case, as he expected to be benefited by that assignment. And I think he also said, that it belonged to his brother-in-law, who was at New-Haven. He said: "I shall do nothing about it, but leave it with my lawyer." I do not recollect distinctly whether he then mentioned Mr. Patten's name.

Q. Did you mention to him that you had called upon his counsel Mr. Patten, and did he deny that Mr. Patten was his lawyer?

A. My impression is, that I stated to Mr. Forbes that I had had an interview with Mr. Patten, and had communicated to him my reasons for having accepted the fifty dollars for the debt. I inferred, from the conversation, that Mr. Patten was his counsel. I had called on Mr. Forbes in consequence of a letter I had received from Mr. Patten. This interview was induced by the letter of Mr. Patten, asking the interview with him, and was, I think, the commencement of the above-mentioned conversation with Mr. Forbes. I think the letter of Mr. Patten is destroyed.

Q. How long after the acceptance of the fifty dollars, and the execution of the assignment, did this conversation occur or take place with Mr. Forbes?

A. Within a few days after my return to this city, after an absence of about two months.

Q. Did Mr. Forbes, in any of these conversations in relation to this judgment, speak of his moneyed difficulties with his former partner, Mr. Kelly?

A. Yes, sir; in all these conversations with me he spoke of his having been deceived by his former partner, Kelly; and having had to pay large sums of money for him.

Q. Did he leave you to understand that the moneyed transactions and partnership dealings between him and Kelly were still unsettled?

A. I so distinctly inferred.

By Mr. Patten—

Q. Please to state how you came to know me in this transaction?

A. From the note which I found addressed to me or my brother; but I think it was to myself.

Q. Did you not receive a note from me, that Mr. Brentnall had left with me a demand for settlement or collection?

A. It is impossible for me to say. I know I could not comprehend it, and went to Mr. Manning to understand it. I do not recollect whether or not the name of Mr. Brentnall was mentioned in it.

Q. When you called on me after receiving my note, did I not tell you that Mr. Brentnall had left that demand with me for collection?

A. I do not recollect that any thing was said about a demand being left for collection. My object in going there was to explain to Mr. Patten my reasons for making that assignment, and accepting the fifty dollars and note in liquidation of the debt. I don't recollect that Mr. Brentnall's name was mentioned at Mr. Patten's office. I went there to state that my brother was not satisfied with the arrangement, and I was willing to explain the note to him. Mr. Brentnall's name may have been mentioned, but without my observing it, as I knew of nobody and thought of nobody in the matter but Forbes; nor should I have called on Mr. Patten, but for his having said something in the note about my liability for executing the assignment as attorney for my brother, without authority.

Q. How or why did you understand, in the negotiation with Mr. Forbes concerning the judgment, that the assignment was for his benefit entirely, as you have stated?

A. Mr. Forbes said, that he wished to be released from this also; I think he also spoke of his being worth nothing, and unable to do any thing as long as these claims were pending. That he was dependent on his father-in-law, Mr. Judd, for support. I recollect I also asked him seventy-five dollars. He said he could not do so, but that he would give his note for the rest, as the only thing he could do, as he had no more, and the old man, his father-in-law, Mr. Judd, from whom he had received the fifty dollars, would not forgive him if he knew of his giving

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any thing more for the debt. He received the fifty dollars in my presence from a clerk of Mr. Judd's, in his counting room. I received it at the counting room of Mr. Judd.

Q. Have you signed other papers than this assignment as attorney for Charles Green?

A. I believe this is the only paper, except notes and checks, which I signed while a clerk of my brother, and except in a single instance, when I received a special power of attorney to convey lands for him in Maine and New-Hampshire, when I was about going to those states. I never signed for him as his attorney any other assignment of this kind, nor to the best of my recollection any other papers than those above mentioned.

Q. During your agency for your brother, did you act as his general agent in receiving and making payments for him?

A. I did.

Q. Was any entry made in the books of your brother of the receipt of the fifty dollars?

A. No, sir; I left town very soon after receiving it. On my return to the city, after an absence of about two months, I found that Mr. Barrett, who was formerly book-keeper of my brother, had charge of his books again. I called on him and mentioned the receipt of the fifty dollars, and also the amount of the note for \$27.37, and suggested to him to credit those sums to the account of Kelly & Forbes. He replied, that during my absence my brother had received notes from Mr. Manning and Mr. Patten, relative to this assignment. Mr. Barrett further said, that my brother was dissatisfied with the arrangement: that he had given me no authority to make it, and had never sanctioned it. No entry was ever made of the receipt of the money or the note in my brother's books.

Q. How did you first know that there was a fund in court, on which the judgment in question was a lien?

A. I learned it from Mr. Manning, on my calling upon him, which was the day previous to my seeing Mr. Patten.

Q. Did your brother ever dissent from any other settlement of a debt made by you except the one in question?

A. I never to my recollection compromised any other debt

than the one in question. In one instance, in a case where a person had failed, my brother handed me a note, saying I might have whatever I could get for it; and in that case I received less than the full amount, or whatever I could get for it, for my own benefit.

Q. Had your brother any clerk or agent at the time of the assignment except yourself?

A. At the time of the assignment, my brother had no clerk, nor did I consider myself his clerk, as he was doing no business.

Q. Was your brother, from any and what cause, incapable at that time of attending to his own business?

A. He was capable of transacting his own business then and always, as far as I knew.

Q. Why then did you attend to his business, as his general agent?

A. I did not attend to his business at that time as his general agent, because he had no business. He had been out of business two years.

[Being cross-examined by Mr. Manning, on the part of Charles Green, the witness deposes as follows:]

Q. When you speak of your acting as the general agent of your brother, do you or not mean, that you were such general agent while you were a clerk of your brother's in his store, and while he was transacting business?

A. I was his agent when he was in business some two or three years since. While I was a clerk in his store I was not in the habit of making entries in the books, except occasionally, as he had a clerk in his store expressly for that purpose. It was Mr. Barrett.

Q. Did you know that a judgment had been obtained on the claim, before Mr. Forbes informed you of it?

A. To the best of my recollection, I was not aware that any judgment had been obtained against the parties till after my return.

Q. When you made the assignment, did you know that the claim was a lien on any real estate?

A. I did not.

Q. Had you any knowledge of the interest of Mr. Kelly in

the mortgaged premises sold in this cause, or of Mr. Kelly's having any real estate in this city or elsewhere?

A. I was entirely ignorant of such mortgage, or of Mr. Kelly's having any real estate.

Q. When you executed the assignment in question, had you any power or letter of attorney from your brother, authorizing you to sell, assign, or compromise this judgment?

A. No; I had not.

Q. Had either Mr. Kelly or Mr. Forbes, prior to the assignment in question, made any offer for the settlement or compromise of this judgment, or the claim on which it was founded?

A. Mr. Forbes, some months after the failure, called at my brother's office, and made me some proposals for the liquidation of the notes which my brother held against him. The exact amount which he offered to pay I don't recollect. The proposition was made to me, I communicated it to my brother, who refused to accept it; soon after, I now recollect, my brother took those notes to his lawyer to be sued. I think it was to Mr. Floyd. I can not say how long it was after Mr. Forbes's failure.

Q. Did offers, or propositions of compromise, come from Mr. Kelly?

A. Not that I recollect. Kelly was out of town.

Q. Do you or not know of Mr. Kelly's having made any other, and what offers, as to the claims against Kelly & Forbes, and when were such offers made?

A. About four years since, I should think, Mr. Kelly and Forbes offered drafts on Paine & Ames for, as I think, fifty per cent. of the claims, which offer I made known to my brother for his acceptance or refusal. His reply was, he would not accept of the drafts, nor any thing short of the full amount.

[Being again examined by Mr. Seely, the witness deposes:]

Q. In those cases where Kelly did give drafts on Paine & Ames, were they accepted by Paine & Ames?

A. I have heard that they were accepted, but were not paid when due.

Q. Did you execute the assignment in question before you left the city?

A. I did.

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Q. How do you reconcile that fact with what you have just stated above, that you were not informed of any judgment until your return?

A. I only knew this, that there were notes, one or two in existence, against Mr. Forbes, and I supposed the assignment was for the notes; I took his word as to the assignment; I don't think that I read it; I only looked at some parts of it. I did not know there was a judgment; if I had known it before, it had escaped me.

[Being again examined by Mr. Manning, the witness deposes:]

Q. As to the drafts on Paine & Ames, of which you have spoken, which you state you heard were protested, were they or not, after being protested for non-payment, paid or secured?

A. I have been informed by the assignees of Kelly & Forbes, that the amount of them had been paid or secured.

Walter C. Green, being again produced and examined on the part of the claimant, Charles Green, deposes as follows:

Q. Was Charles Green a merchant in the city of New-York in the year 1830?

A. Yes, sir. He was a merchant in general commission business.

Q. Who lodged the power of attorney from Charles Green to you in the United States Bank?

A. I do not know, but presume my brother lodged it.

Q. Was it ever in your possession?

A. Not to my best recollection.

Q. Did you ever see it, or read it, or hear it read?

A. I do not recollect that I ever did; I only remember that Charles Green told me he had lodged a power in the several banks.

Q. Did he tell you for what purpose he had lodged the powers in the banks?

[The question is objected to by the counsel of the claimants, Brentnall and Decasse and Miede, and is overruled by the master.]

Q. Who put the claim of Charles Green against Kelly and Forbes in suit?

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A. I presume my brother, Charles Green, or that it was done by his order, though I know nothing about it.

Q. Did you ever use or act under these powers, except for banking purposes?

A. Never, to my knowledge.

Horace D. Forbes was then sworn on his *voire dire* and afterward in chief. The substance of his testimony was, that the negotiation and transfer of the judgment to Henry W. Brentnall, who was his (Forbes) brother-in-law, was made for the exclusive benefit of Mr. Judd, his father-in-law. That he (Forbes) nor Brentnall had no pecuniary interest in it. The assignment was held by Brentnall in trust for Mr. Judd.

The assignment of the judgment to Brentnall and the power of attorney from Charles Green to Walter C. Green, deposited in the United States Branch Bank, were then proved, as follows:

“This Indenture, made the 24th day of April, 1835, between Charles Green, of the first part, and Henry W. Brentnall, of the city of New-York—Whereas the said party of the first part, on the 23d June, 1832, recovered judgment in the superior court against Hezekiah Kelly and Horace D. Forbes, for the sum of three hundred and eighty-six dollars damages and costs—now this indenture witnesseth, that the said party of the first part, in consideration of fifty dollars, to him duly paid, have sold, and by these presents do assign, transfer and set over, unto the said party of the second part, and his assigns, the said judgment, and all sum or sums of money that may be had or obtained by means thereof, or on any proceedings to be had thereon; and the said party of the first part do hereby constitute and appoint the said party of the second part, and his assigns, his true and lawful attorney irrevocable, with power of substitution and revocation, for the use, and at the proper costs and charges of the said party of the second part, to ask, demand, and receive, and to sue out executions, and take all lawful ways for the recovery of the money due or to become due on the said judgment; and, on payment, to acknowledge satis-

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faction, or discharge the same and attorneys, one or more under him, for the purposes aforesaid, to make and substitute, and at pleasure to revoke, hereby ratifying and confirming all that his said attorney or substitute shall lawfully do in the premises; and the said party of the first part doth covenant that he will not receive or collect any, or any part thereof, nor release or discharge the said judgment, but will own and allow all lawful proceedings therein, the said party of the first part harmless of, and from all costs in the premises.

“In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

(Signed)

“CHARLES GREEN, [L. S.]

“*By his Attorney,*

“WALTER C. GREEN.

“Sealed and delivered in the presence of

“ALEXANDER KNIGHT.”

“Know all men by these presents, that I, Charles Green, of the city of New-York, merchant, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, Walter C. Green, of the city of New-York, my true and lawful attorney, for me, and in my name, place, and stead, and to my use to do, transact, and perform every act, matter, deed, and thing whatsoever, which I myself might or could lawfully do, if personally present—and also to make, execute, sign, seal, deliver, draw, subscribe, endorse, accept, and negotiate, all bills, bonds, drafts, checks, notes, acceptances, transfers, assignments, compositions, releases, discharges, and other instruments whatsoever, which he may deem useful, necessary, or advantageous, and to collect and receive all moneys due, or which may become due to me, with power of substitution and revocation.

“Giving and granting unto my said attorney, and to his substitutes, full power and authority in the premises; hereby ratifying and confirming all and whatsoever my said attorney, or his substitute or substitutes, should lawfully do in the premises in virtue thereof.

“In witness whereof, I have hereunto set my hand and seal,

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this twelfth day of January, in the year of our Lord one thousand eight hundred and thirty.

(Signed)

“CHARLES GREEN, [L. S.]

“Sealed and delivered in the presence of

“AUGUSTUS FLOYD.”

The chancellor, on affirming the decree of the vice chancellor, gave the following opinion :

THE CHANCELLOR.—This is an appeal by C. Green from an order of the assistant vice chancellor of the first circuit, upon exceptions to a master's report, as to the right to surplus moneys arising from a sale of the mortgaged premises, under a decree. And the only question necessary to be considered is, whether the power of attorney from the appellant to his brother, W. C. Green, was sufficient to authorize the latter to assign the judgment in question. The power is not one to do a specific act, and concluding with general words, which general words are usually restricted to the specific object of the power. But it is a general power in the most extended sense of the term. It commences by making the brother the true and lawful attorney for the appellant, “for me, and in my name, place, and stead, and to my use, to do, transact, and perform every act, matter, deed, or thing whatsoever, which I myself might or could lawfully do if personally present; and, also, *to make, execute, sign, seal, deliver, draw*, subscribe, endorse, accept, and negotiate, all bills, bonds, drafts, checks, notes, acceptances, *transfers, assignments, compositions*, releases, and other instruments whatsoever, which he may deem useful, necessary, or advantageous; and to collect and receive all moneys due, or which may become due to me, with power of substitution and revocation.” And it concludes with the general grant to such attorney, of full power and authority in the premises. Under this general power there can be no doubt that the attorney had as much authority to execute an assignment of the judgment, upon receiving the whole or a part thereof, or to make an accord and receive a part of the judgment in satisfaction of the whole, as he had to draw or endorse a note, or to do any other act for the constituent.

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Nor does it lie in the mouth of the constituent, or of his attorney, to say, this assignment was not made by virtue of this power, for the assignment purports to be made under the hand and seal of Charles Green, the party of the first part therein, and is subscribed by the attorney thus: "Charles Green, by his attorney, Walter C. Green." [L. s.] By the manner of executing the instrument, therefore, W. C. Green held himself out to Forbes as being the attorney of his brother. And it is wholly incredible, that he did not at that time believe he had a power which authorized him to execute the assignment as the attorney of his brother, and that he intended to commit a fraud upon Forbes, by acting in a character which he did not possess.

Again, it is immaterial whether this instrument was good as an assignment to be filled up in the name of such person as Forbes should think proper to insert therein, or not. For if that instrument is invalid as an assignment, for any reason, the agreement between W. C. Green and Forbes, and the payment of the \$50, and the giving of the note, would operate as an accord and satisfaction, which the attorney had a right to make and receive, under the power. The whole interest of the appellant in the judgment was, therefore, extinguished, in one way or the other.

The order appealed from must be affirmed, with costs, and the proceedings are remitted to the vice chancellor of the first circuit.

R. Manning, Attorney & Counsel for appellant, Chas. Green.

First.—POWER.

1. A person dealing with an agent, or attorney in fact, is bound to know whether he is such; and the nature and extent of the authority given by the principal or constituent; and to that end he should require the attorney to produce the power for his inspection. (3 *Hill*, 262, 279; 5 *Ves.* 213.) In the latter, the lord chancellor says, "I take it not merely to be a principle of the law of *England*, but by the *Civil Law*, that if a person is acting *ex mandato*, those dealing with him must look to his mandate."

2. There is no substantial difference between a special power of attorney to do a particular act, and a general power

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to do all acts in a particular business. And on this principle, a general power, in terms, has been cut down to a particular purpose, according to the intent of the party giving the power. (*The North River Bank v. Aymar and others*, 3 *Hill's Rep.* 262; *Story on Agency*, 70; *Atwood v. Munnings*, 7 *Barn. & Cress.* 278; 1 *M. & R.* 78; 8 *Wend.* 494; 1 *Taunt.* 347; 2 *Cow. Rep.* 200, 233.)

The object of the power of attorney in question in this case, was to authorize Walter C. Green to do all acts for Charles Green in a particular business, viz.: his banking business at the Branch Bank of U. S., in the city of New-York, in which said Charles Green had deposited said power for that purpose only. A like power of attorney was also deposited by him in the custom-house, and in several other banks of the city of New-York. (*See p. 11, fol. 4; p. 12, fols. 10, 11; p. 18, fol. 31; p. 23, fols. 46, 47.*)

A power of attorney, like any other deed, can take effect only by, and according to its delivery, and is limited and restricted accordingly.

In view of these general principles, and of the facts and circumstances of the case, it is contended, that the assignment of the judgment in question is void as to Charles Green, because Walter C. Green was not authorized to make it, and because it was a fraud on Charles Green.

3. It appears that on the 14th day of July, 1832, Charles Green recovered this judgment in the superior court of the city of New-York against Hezekiah Kelly and Horace D. Forbes, for the sum of \$386.01 damages and costs. And, that, on the 1st of March, 1836, the master to whom it was referred, reported to the court, that there was then due on this judgment the sum of \$484.03, and that it was a lien to that amount on the surplus moneys paid into court in this cause, and that the claimant Charles Green was the owner of the judgment and entitled to the money.

4. It appears, also, that one Henry W. Brentnall claimed title to this judgment by an assignment of it to him for \$50, by Walter C. Green, as attorney for Charles Green, made on the 24th day of April, 1835, of which Charles Green was igno-

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rant until it was produced before the master. And he denies that Walter C. Green had any authority for making it.

5. It was conceded on the other side, that this assignment does not bind Charles Green, unless Walter C. Green was invested with adequate power to make it. And for that power they referred to a power of attorney on file in the office of the Bank of the United States, in the city of New-York, deposited there by Charles Green himself, on the 12th day of January, 1830, and there remaining on file on the 23d of January, 1836, which accidentally came to their knowledge in the course of their examination of their witness, Walter C. Green, whom they produced to prove that he was authorized to make the assignment. (*P. 18, fol. 31, and p. 26; p. 23, fol. 46.*)

6. But Walter C. Green expressly testified, that he did not act under that power, or any other written power, when he compromised this judgment with Forbes, and signed the instrument prepared by Forbes for transferring it to Brentnall, as Forbes's trustee. And that he never acted under said power except for banking purposes. That it never was delivered to him; that it never was in his possession; that he never saw said power, or heard it read, and was ignorant of its contents, excepting that he had been informed by said Charles Green that he had lodged powers of attorney in certain banks in the city of New-York and at the custom-house, to authorize him to transact for him his custom-house and banking business, respectively. And, moreover, this power of attorney had then become dormant, for its authority had terminated more than two years before, when said Charles Green had retired from business, and Walter C. Green was no longer in his employ. For then the business, for the transaction of which the power had been given, was executed; and the power itself remained in the possession, and was the property of the bank, as a document. (*See p. 12, fols. 8, 9, 10, 11; p. 16, fol. 22; p. 17, fols. 26, 27; p. 18, fol. 31; pp. 23, 24, fols. 46, 47, and p. 26; Kent's Com. 2 v. 643.*)

7. As this power of attorney was never delivered to Walter C. Green, nor in his possession, but only to the United

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States Bank, it was not a general power to him, except for the purposes for which it was delivered to the bank.

8. The intent of the person who gives a power of attorney is to govern its construction and use. This is a well settled rule. And it is manifest, that this power was never intended by Charles Green to be applied to the compromise, or collection or transfer of this debt, or judgment, after his repeated rejections of Forbes's offers. And especially, since Forbes a year or two before had offered 50 per cent., which Charles Green had rejected; and put the claim in suit and recovered the judgment in question, declaring he would take nothing short of the full amount. (*See p. 17, fols. 27, 28; p. 10, 11, fols. 2, 3, 4.*)

9. And this intent as to the power is further manifested by another circumstance: That when shortly after this assignment, Walter D. Green went to the states of Maine and New-Hampshire, to sell and convey certain lands for the said Charles Green, he was furnished with a power of attorney for the purpose. (*See p. 15, fols. 20.*)

10. It has been said that the safety of persons dealing with attorneys in fact, requires that this assignment should be sustained. But it is contended that this position is not tenable, and there is no rule of law to support it. Walter C. Green proves, (and he is their own witness,) that he assigned the judgment to Forbes without any authority from Charles Green, who, he says, was entirely ignorant of it; and when he informed him of it, he refused to ratify it. And when he told Forbes of this, and offered to return the \$50 and the note, Forbes did not pretend that he had been either wronged or deceived by him, but said he had expected to have been benefited by the assignment. (They neither of them appear to have had any knowledge or reference to this power, in this transaction, *p. 13, fol. 13; p. 14, fols. 14, 17, 18.*)



Second.—ASSIGNMENT IN BLANK.

1. But, supposing this power to be sufficient, and that Walter C. Green acted under it in making the assignment, yet the assignment is invalid, because it was executed in blank

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without any description of the judgment, or designation of the assignee, and in that state delivered to Forbes.

FRAUD.

 No proof that Forbes knew it was a lien on Kelly's land. 

2. It is void, also, because it was obtained from Walter C. Green by the application and misrepresentation of Forbes, after his propositions had been repeatedly rejected by Charles Green. And Walter C. Green was ignorant of the value of the judgment which Forbes represented to him to be worth nothing; when in fact it was good to the full amount of it, as a lien on the real estate of Kelley.

3. The justice of the case requires, that Charles Green should not be held bound by this assignment. For, while Forbes loses nothing, but in fact gains the object he professed to have in view in buying up the judgment, Green is defrauded of a just demand.



NOT ACCORD AND SATISFACTION.

4. But it is said by the chancellor, that if this assignment, for any reason, is invalid, the agreement between Walter C. Green and Forbes, and the payment of the \$50 by the latter, and giving his note for \$27 more, would operate as an accord and satisfaction, and extinguish the whole interest of the appellant in the judgment. But this position is disputable. For, according to the authorities, the acceptance of a less cannot be a satisfaction in law of a greater sum then due; nor can it operate as an extinguishment of the debt. There is, therefore, no merger or extinguishment of this judgment. (*Fitch v. Sutton*, 5 *East*, 230; *Cumber v. Wane*, 1 *Str.* 426; *Heathcote v. Crookshanks*, 2 *J. R.* 449; *Seymour v. Minturn*, 17 *J. R.* 169; *Boyd v. Hitchcock*, 20 *J. R.* 76.)

5. The order or decree appealed from is also erroneous, because it directs the said fund in court to be applied to the payment of a judgment in favor of Lewis Decasse and Pierre A. Miede, against Hezekiah Kelly and Horace D. Forbes: whereas, in the master's said report no such judgment is men-

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tioned; the judgment there stated is against Hezekiah Kelly only.

[ You have no interest in that question, if your judgment is assigned. ]

Now, a judgment against two cannot be taken to be the same as a judgment against one only. (*Readshaw v. Wood*, 4 *Taunt.* 13.)

6. The decree of the chancellor, and also that of the assistant vice chancellor, ought to be reversed, with costs, and the master's report confirmed; and directions given for an order to be entered, directing the clerk of the first circuit to pay to Charles Green or his solicitor, out of the said surplus fund, the amount of said Green's judgment, as reported by the master.

R. MANNING, *of Counsel for appellant.*

Edward H. Seely, Attorney, and

W. A. Seely, Counsel for respondents, Decasse & Miede.

First. The power of attorney by Charles Green to Walter C. Green was in form and terms sufficient to authorize the latter to make the assignment—or to make an accord and satisfaction as to the judgment, and the claim of Charles Green on the surplus funds in court became thereby extinguished.

Second. It did not lie in the mouth of Charles Green or of Walter C. Green to say that the payment was not made in pursuit of the powers given.

Third. That the statement of Walter C. Green given in evidence before the master, that he did not believe when he executed the assignment he was authorized to do so, and also that he did not know that he had executed an assignment of the judgment, were wholly incredible.

Fourth. The procurement by Forbes as a defendant in the judgment, of the assignment for his own benefit, satisfied and extinguished all claim on the judgment by or for him, and thus gave the judgment of Decasse & Miede the sole right to the fund in court, subject to the \$25 directed to be paid to Brentnall.

Fifth. It is manifest from the evidence before the master that the appellant was induced to deny the power and to repudiate

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the assignment in consequence of the unexpected appearance of the surplus fund in court, after the execution and delivery of the assignment, and the whole face of the evidence is marked with a want of frankness and with insincerity.

W. A. SEELY, of Counsel for respondents.

Assignment—though in blank, it was good to extinguish the judgment—being given for the benefit of Forbes, the debtor—authority to fill up blanks.

DECISION.—Decree affirmed unanimously.

NOTE.—Where an assignment of a judgment was executed by “C. G. [L. S.] by his attorney, W. C. G.,” and it appeared that W. C. G. had a general power of attorney from C. G., which was claimed by C. G. to have been in fact restricted to a particular business, of which this assignment was not within its scope—*held*, that by the manner of executing the assignment, the constituent and his attorney were estopped from saying that the assignment was not made by *virtue of the power*.

A negotiation and agreement by the attorney to receive part payment or accord and satisfaction for a judgment belonging to his constituent under such a power, and the actual receipt of such payment—*held*, valid and binding on the constituent.

Not reported.

THE EAGLE FIRE COMPANY OF NEW-YORK *agt.* FLANAGAN
AND OTHERS.

Questions discussed.

1. Whether the evidence introduced before the master, on a reference to ascertain claims to a surplus fund in court, proved *usury* as to a judgment of one of the claimants?

2. Whether the defence of usury can be set up by one claimant against another where the usury is charged as between one of the claimants and the judgment debtor, whose surplus funds are paid into court?

It appeared by the report of the master that he had paid into court the sum of \$1,406.77, for surplus moneys arising

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upon the sale of the mortgaged premises in this cause. On filing a notice of claim of William Duff to the whole, or some part of said surplus moneys, a reference was ordered to Thos. Addis Emmet, Esq., the master, to ascertain and report the amount due to said Duff, or to any other person, which was a lien upon said surplus moneys, and to ascertain the priorities of the several liens thereon, &c.

The evidence of the first claim introduced was made by Holbert Smales, Esq., upon a judgment in the supreme court, docketed May 2, 1842, in favor of Wm. L. Atwater against the said Edward Flanagan and others, upon which there was due \$253.10, which had been assigned to Smales, and was then held by him in trust for William Duff. This claim was proved by H. Smales and George Buckham, Esqs.

The next claim was made by William Duff on a judgment in his favor against said Edward Flanagan, docketed in the supreme court on the 9th Nov. 1842, upon which there was then due \$1,197.06, which was proved by Duff upon statement made under oath. Upon this judgment there was charged to be *usury*, by John Blake, a claimant as a mortgage creditor of said Edward Flanagan. Blake filed an affidavit of his claim, and called for an examination on the question of usury. The testimony taken on that question was as follows :

Edward Flanagan, who being duly sworn and examined this 29th day of April, 1844, answers as follows :

Ques. Being shown the warrant of attorney, upon which the judgment in favor of William Duff was entered up, and on which the claim is founded, and asked, "Is that your signature?"

Ans. Yes, it is, and my seal, and executed on the day it bears date, the 9th of Nov. 1842, as I believe.

Q. How long have you known Mr. Duff?

A. I have known him six or seven years.

Q. Have you had money transactions with him during those years?

A. Yes, sir, I have borrowed money of him.

Q. Has he become endorser upon your notes?

A. Yes, sir.

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Q. Was the warrant of attorney executed, and judgment confessed, as security for money so borrowed, and endorsements paid by him?

A. Yes, sir.

Q. Was there any agreement or understanding with regard to interest, or was any bonus or sum of money agreed to be paid, or paid for any of the sums of money you received from Duff? (Question objected to, because leading, and because, if it aims at proving that anything more than legal interest was received, it is a matter that cannot be inquired into by Mr. Blake.) Answered, subject to the objection, and the question reserved for master's decision.

A. At the time I got this money from Mr. Duff, or before I got it, I wanted money very much, and I told Mr. Duff if he would let me have some money then, I would allow him one hundred dollars. It was for a thousand dollars which we spoke of first, and then he was on some of my notes.

Being cross-examined by counsel for Mr. Duff, and asked,

Q. Look at the checks Nos. 7, (check of Wm. Duff for \$195.33,) 8, (check of Wm. Duff for \$200,) 9, (check of Wm. Duff for \$310,) and 10, (check of Wm. Duff for \$200,) and say whether you received those checks from Mr. Duff, and the money on them from the bank?

A. Yes, sir.

Q. Look at the note marked No. 11, (note of Flanagan to Duff for \$200, at ninety days,) and say whose note it is, for whose accommodation it was endorsed, and by whom it was finally taken up?

A. It is my note, endorsed for my benefit, and taken up by Mr. Duff.

Q. Look at the papers marked Nos. 12 (Flanagan's note to Duff for \$315, at ninety days) and 13, (Duff's note to Flanagan for \$315,) and explain the transaction they refer to?

A. They are exchange notes, and Mr. Duff's was taken up by him.

Q. At the time you confessed the judgment to Mr. Duff, did you give him any other security; and if so, state what it was?

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A. I gave him an assignment of a lease on part of the property sold in this cause, in which a rent was payable of \$425 per annum, subject to a right of renewal for five years more, at \$500 per annum, and which was so renewed last May, and then held by Mr. Duff.

Q. Do you know how much money Mr. Duff received under that assignment?

A. He received in all \$350. It is correctly stated in Exhibit No. 6, as he received it.

EXHIBIT No. 6.

Judgment docketed 9th November, 1842, on a bond in the penalty of \$3,000, conditioned for \$1,500, as security for money loaned and for liabilities incurred, on which there is now due as follows :

1842, Nov. 8th.	My check on Chemical Bank,	\$200.00	
	Int. to 1st August, 1843, 8 mos. 23 days, . .	10.19	
		—	\$210.19
" Nov. 10th.	My check on do. for	310.00	
	Int. to same time, 8 mos. 21 days, . .	15.72	
		—	325.72
" " "	My check on do. for	200.00	
	Int. to same time, 8 mos. 21 days, . .	10.13	
		—	210.13
" " 14th.	My check on do. for	195.33	
	Int. to same time, 8 mos. 21 days, . .	9.68	
		—	205.01
1843, Feb. 12th.	To paid your note, dated Nov. 11th, 1842,	200.00	
	Int. to same time, 5 mos. 16 days, . .	6.44	
		—	206.44
" March 19th.	To my note lent you, 16th Dec. 1842,		
	and now paid by me,	315.00	
	Int. to same time, 4 mos. 12 days, . .	8.08	
		—	323.08
			1,480.59
1843, Aug. 1st.	Cr. By cash received of William & Henry Dunn, for rent,	100.00	100.00
			1380.57
	Int. to 1st November, 1843, 3 mos., . .		24.23
			1,404.80

The Eagle Fire Co. of New-York agt. Flanagan and others.

1843, Nov. 1st.	Cr. By rent received of same,	\$125.00
		<hr/>
		1,279.80
	Int. to 1st. Feb. 1844, 3 mos.,	22.39
		<hr/>
		1,302.19
1844, Feb. 1st.	Cr. By rent as above,	125.00
		<hr/>
		1,177.19
	Int. to 29th April, 1844, 2 mos. 28 days,	20.17
		<hr/>
	Am't due 29th April, 1844,	1,197.36

Direct resumed.

Q. You stated in your direct examination that you applied to Mr. Duff for one thousand dollars, and you said you would allow him one hundred dollars for the same. Was this for the loan of the money, and what amount of money did he give you? (Objected to, for the reasons before given, and that the language of the witness is not properly stated. Objection allowed.)

Q. What sum of money did you apply for from Mr. Duff at first?

A. One thousand dollars.

Q. What sum of money did you promise to pay him for the use of, or loan of the same?

A. I told him I would give him one hundred dollars.

Q. How much money did he pay you of the thousand dollars?

A. He gave me nine hundred dollars in cash, and at the time he was on my notes, and I told him he might as well make it one thousand five hundred dollars, and include the notes he was on. This is about as near as I can think of.

Q. Are exhibits Nos. 11 and 13 the only notes he was then on for you?

A. Yes, sir. They are the notes he took up.

Q. Did not the judgments secure those payments?

A. Yes, sir; that was what it was intended for.

Q. Was all the cash you received, through those checks?

A. Yes, sir.

Question by counsel for Duff.

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Q. Was this bonus of one hundred dollars, that you speak of, exacted by Duff, or was it a voluntary offer on your part?

A. I offered it to him.

Q. Had you ever borrowed money of Mr. Duff before this?

A. Yes, a number of times.

Q. Had he ever exacted any thing beyond legal interest on any occasion before this?

A. I don't know that he has.

EDWARD FLANAGAN.

Sworn to before me, this 29th April, 1844.

THOS. ADDIS EMMET, *Master in Chancery.*

Patrick McBarron, jr., by Brady and Maurice, his solicitors, also filed a claim, being a judgment against Flanagan in common pleas, in favor of claimant, for \$176.05, docketed November 23, 1842, upon which was claimed to be due \$93.87.

The master reported that the claim of Hobert Smales in trust for Wm. Duff, for \$255.16, was the first lien upon the surplus fund.

That the claim of Wm. Duff was the next oldest lien in point of time, but that in consequence of usury between the parties upon the loans and transactions for which the judgment was given as security, the said claim was void to the extent of the liens of the said other claimants, Patrick McBarron, jr., first, and John Blake second, who had the next and subsequent liens upon said surplus. The opinion given by the master on excluding the claim of Wm. Duff for usury, and allowing Blake to set it up and take advantage of it, is as follows :

The next claim to be considered is that of William Duff. This arises under a judgment in favor of Duff, against Edward Flanagan, by confession; and is likewise resisted by the claimant, Blake, on the ground that it was given to secure loans made by Duff to Flanagan, for which he, Duff, was to receive more than legal interest, and that, therefore, the judgment is void, for usury, as against said Blake. On the part of Duff, it is contended, .

1st. That no usury exists, or has been proved.

2d. That, even if usury did exist, the claimant, Blake, has no right to set it up, or take advantage of it.

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3d. That, even if usury were proved, it does not vitiate Duff's claim for the amount actually advanced by him.

To establish the usury, Edward Flanagan has been examined, who states that the warrant of attorney was executed, and the judgment confessed, as security for money borrowed, and endorsements paid.

The questions put to Flanagan, and answered by my decisions on the objections made by Duff's counsel, I have duly considered, and am of opinion that said questions are admissible and proper, and that his answers are legal testimony. Flanagan testified that he applied to Duff for \$1,000, and said he would give \$100 for it. And that of this \$1,000, there was but \$900 paid in cash, and when the judgment was given as security, the notes on which Duff was liable for Flanagan, amounting to \$515, were included, and the sum of \$1,500 was agreed upon as the amount of the indebtedness, and for this sum the judgment was accordingly entered up.

This testimony is not only unimpeached, but strongly confirmed by the facts in the case. The checks produced by Duff showed that the whole amount paid by Flanagan was but \$905.33—that it was all paid within a week—that the security given to cover this, and the notes which were not yet matured, come within nine dollars of the amount stated by Flanagan; and the amount of the claim first put in before me by Duff is nearly one hundred dollars more than the statement of the account between the parties, with legal interest calculations.

The counsel for Duff claims the right to amend his claim. It is true, a party has a right to amend his claim before the master; but I should question very much the legality of allowing him to amend in a case like this, which would, in fact, enable him to disregard his claim founded on an usurious instrument or security, and go back to an account current, which had been merged in an usurious security. This would be nothing less than allowing the claimant to evade the statute of usury, after the fact of the usury had been established. But admitting that the claim as to the amount actually due can be altered or amended, the error must still stand, as a very strong fact in corroboration of the testimony of Flanagan, especially as the

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amendment was made after the question of usury had been raised against the claim. But does this amending the claim as to the amount due, in fact better the condition of the claimant? Is he not a judgment creditor? and is it not under his judgment he claims, let the amount be what it may? This certainly must be his position; for if he waives his judgment, and claims under the account filed, he has no lien on the surplus. Regarding, therefore, the claim as founded on the judgment, I am called upon to decide whether or not this judgment is tainted with usury. On this point I am of opinion, not only from the positive testimony of Flanagan, which has not been impeached, and which I cannot therefore disregard, but from the facts before stated, corroborating said testimony, that said loans were made upon the bonus offered by Flanagan, and consequently on an understanding that said Duff was to receive more than legal interest for the same; and therefore the judgment securing said loans is, under the statute, void.

In the case of *Colton v. Dunham*, (2 *Paige*, 273,) it is decided that whatever shape or disguise the transaction may assume, if a profit beyond the legal rate of interest is intended to be made out of the necessities or improvidence of the borrower, or otherwise, the contract is usurious.

And in 2 *Edwards' Chancery Reports*, p. 267, the decision is equally strong and clear, to the same effect, as also in the cases cited on the argument. The cases in 2 *Pickering* and 8 *Cowen*, cited by the counsel for Duff, and particularly that in 8th and 9th *Paige*, I have closely examined, as in fact bearing on the most important question raised, that is, whether the claimant Blake has a right to avail himself of the usury established against Duff. The case in 8 *Paige*, *Post v. Dart*, page 639, decides, "that the defence of usury may be set up by any one who claims under the mortgage deed in privity with him," &c. "An usurious mortgage is not only void, as to the mortgagor, but as to all others who succeed to his rights in the mortgaged premises, either by operation of law or otherwise."

In order to take the present case out of the effect of this decision, it is contended that there exists no privity of estate

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between Blake, the second mortgagee, and Flanagan, the mortgagor, and that to make such privity of estate, there should have been a foreclosure, or at least steps taken by Blake to foreclose. That he cannot be regarded as assignee of Flanagan, or as a purchaser under an execution, who becomes an assignee by operation of law, in both which cases a legal privity with the debtor is created. The object of the 136th rule was to lighten the expenses of foreclosure cases, without impairing in any way the rights of others against the mortgagor, or rather, in the equity of redemption on the mortgaged premises. Prior to this rule it was necessary to make all having any claim on the premises by mortgage, judgment, or otherwise, parties to the suit, and to serve copy of bills on them, &c., and to allow costs to all the defendants who should answer. The rule only alters the old practice of the court, and directs the mode by which the like class of creditors may now ascertain their rights in any surplus or equity of redemption, belonging to the mortgagor, without having it all consumed, or in a great degree diminished, by the expenses of unnecessary answers, &c. And in the case of the *Union Insurance Company v. Van Rensselaer*, (4 Paige, 85,) it is decided, that "in mortgage cases, defendants whose claims are upon the equity of redemption merely, and who have no interest in the mortgaged premises in opposition to the complainants claim, are not permitted to litigate their claims to the surplus as between themselves, until it is ascertained that there will be a surplus."

Why is not the mortgagor allowed to receive this surplus at once? Because others may have succeeded to his rights in the mortgaged premises, either by operation of law or otherwise. And the 136th rule of the court now establishes the practice by which this fact is to be ascertained. If a second mortgagee establishes before the master his mortgage unsatisfied, he is entitled to the surplus. Why? Because, by virtue of his mortgage, he has succeeded to the rights of the mortgagor. He claims under the mortgagor, and consequently in privity with him, not only by operation of law, but under and by virtue of his express act and deed, and as fully as an assignee, either in fact or by operation of law, could do. It makes no

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matter how many or what kind of claimants there may be to the surplus, if a second mortgagee's claim is good at all, he cannot be regarded as a mere stranger, but must be considered as having succeeded to the rights of the mortgagor, either by operation of law, or otherwise; as between a bona fide grantee or mortgagee, no other question arises but that of priority. They are both regarded as claiming under the mortgagor, and as having succeeded to his rights; and if it is conceded that a grantee of the mortgagor, or a judgment creditor, whose judgment is a lien on the premises subsequent to giving of the mortgage, can avail themselves of the usury, I cannot see by what law or reason a second mortgagee, or any other person claiming under the mortgagor, can be prevented from doing the same.

This is certainly the extent of the decision in *Post v. Dart*, (8 *Paige*,) covering the whole ground, and in my mind is conclusively in favor of Blake's right to take advantage of this defence to the extent of his claim, and which I, therefore, decide to be prior to Duff's, and the second lien on the surplus in this case.

The vice chancellor of the first circuit, Hon. WM. T. McCoun, on exceptions taken by Duff to the master's report, overruled the report so far as the same declared the claim of said Duff to be void in consequence of usury, &c., with costs, and confirmed the residue of the report.


On appeal by Blake, the chancellor, on the 28th Oct. 1845, dismissed the appeal and affirmed the order of the vice chancellor, with costs.

No written opinion was delivered by the vice chancellor or the chancellor. But it was stated in the affidavit of respondent's attorney, that both, at the time of making their decisions, expressed, as the grounds for the same, that no usury was proved against Duff.

Blake appealed to this court.

John McKeon, Attorney, and

Anthony L. Robertson, Counsel for appellant, Blake.

 Duff claimed surplus under a judgment—Blake under

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a junior mortgage, and he attacked the judgment of Duff on the ground of usury. —

First. This court ought to sustain the decision of the master in the court of chancery.

1. Such decision ought not to have been reversed, except where a new trial would have been awarded in a court of law.

2. No new trial would have been awarded in this case in a court of law.

Second. The judgment of the respondent was to secure the payment of an usurious loan.

1. Usury, like any other fact, may be inferred from circumstances. (*Train v. Collins, admr. &c., 2 Pick. 145, 152.*)

2. More reliance is to be placed on the acts than the language of parties in determining their intent, where it is criminal, and the object is to evade the law.

3. The object of the statute of usury being protection against extortion, a knowledge by the lender of the necessities of the borrower, at the time of the loan, will materially affect the construction of the acts out of which the contract of borrowing arises.

4. The loan which followed the offer of illegal interest without rejecting such offer, is to be presumed to have been made according to such offer.

5. The fact of the excess of the amount of the judgment given for the loan above the cash lent and notes to be paid being equal to the illegal interest offered, is *prima facie* evidence that it was for such illegal interest; and in the absence of proof that the judgment was to stand as security for a less sum than its amount, is conclusive.

6. The sum actually advanced having been proved to have been part of the sum sought to be borrowed, the corrupt agreement which is perfect, cannot be purified by a failure to complete it as originally proposed.

7. The fact of the respondent having claimed the larger sum with illegal interest included, was a circumstance tending strongly to corroborate the other proof of usury.



Third. The defence of usury can be set up by these complainants. (*Dix v. Van Wyck, 2 Hill R. 522; Post v. Dart, 8 Paige R. 639.*)



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Fourth. The decree of the vice chancellor should be made to conform to the report of the master.

JOHN McKEON, *Sol'r.*

ANTHONY L. ROBERTSON,
of Counsel for appellants.

 Judgment concludes parties, but not strangers. We could impeach it when set up as a lien to take away a fund belonging to us. 

 REPLY.—Vice chancellor and chancellor wrong in reviewing master on a question of fact. 

*Geo. Buckham, Attorney, and
J. W. Gerard, Counsel for respondent, Duff.*


First. There was no *usury proved*. No meeting of *minds*. A mere offer. No *corrupt agreement*. (2 Cow. 678.)


Usury must be clearly proved. (3 Cow. 284.)

Second. The judgment was not a *fixed, ascertained liquidation of indebtedness* between the parties, but was mere *security* for what he *might* advance *thereafter*, and for two notes lent, and then running. *All* the money, except \$200, was got *after* the judgment given.

Third. No possible calculation that can be made shows that Flanagan's offer, either on \$1,000 or \$900, *was accepted or acted upon*. It was only *security*, and so Flanagan speaks of it in his evidence, for an *approximated amount*.

Fourth. To show that the judgment was a mere *security*, there is no proof or pretence that *Duff* was to take up the *notes*:—He did not in fact. They were *renewed*, and Duff took up the renewals.

 Exhibit 6.—Money paid from time to time after judgment—money advanced, \$905.33. Notes, \$515, with interest, shows no bargain. Judgment only by way of security for such money as should be advanced, and indemnity against notes. Notes not taken up, but renewed—if it had been a final arrangement, Duff would have paid the notes at once. He was not to pay at all, but only to have security—indemnity.

Lease also assigned by way of security. 

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Fifth. The *course of dealing* between the parties repels the *intent* of usury. He had lent him *money* before, and never on any thing more than *legal interest*. Duff is not a money lender.

Sixth. The master makes usury out of the *claim* put in by Duff, as he says. Duff never put in any such claim or knew it. His solicitor, knowing only of the judgment and credits, and not yet having inquired into the circumstances, in his *official* claim, (long before the reference came on,) made his calculations upon the whole judgment as due. But a *notice* or *pleading* of a solicitor, unsigned and unseen by a party, *cannot be evidence against him*.

Duff when he makes *his claim*, which he does by affidavit, before Flanagan was examined, states the balance on *his claim* truly.

GEO. BUCKHAM, *Solicitor for respondent, Duff.*
J. W. GERARD, *of Counsel.*

DECISION.—Judgment affirmed—unanimously.

NOTE.—In the absence of any written opinion or grounds of decision in this case, either by the vice chancellor, the chancellor, or this court, it is fair to presume, that the grounds of the decision expressed by the vice chancellor and the chancellor to the respondent's attorney at the time such decisions were made, were the grounds adopted by this court, to wit: that no *usury* was proved against the respondent, Duff.

Not reported.

ROBERTS, Appellant, *agt.* JONES AND BOGERT, Acting Executors, &c., Respondents.

Questions discussed.

1. Whether the matters set up in the answer of the defendant, Seth B. Roberts, to the amendments of the complainants' bill of complaint, and the schedules annexed, *excepted to* by the complainants, were *impertinent*?

2. Whether such matters should be struck out for *prolixity*?

This was an exception to a master's report, taken by the defendant Roberts.

The defendant, Seth B. Roberts, was the agent of Augustine Hicks Lawrence in his life time, and subsequent to his death acted as the agent of the complainants Jones and Bogert, two of the executors of Augustine Hicks Lawrence, deceased, for certain lands and real estate in Rome and vicinity, in Oneida county.

The bill makes Augustine N. Lawrence, one of the executors, a defendant with Roberts, and charges in substance, that the defendant, Augustine N. Lawrence, failed in 1834 and became insolvent, and that Roberts was informed thereof; and the complainants, the other executors, therefore seek to have the funds of the estate in his hands paid over to them, as the only responsible executors, for the benefit of the legatees of the testator; and to charge Roberts with moneys collusively paid over to A. N. Lawrence, with knowledge of his insolvency. The defendant Roberts, in his answer, admits that Augustine N. Lawrence failed in business in 1834, and that he was reported to become then insolvent and unable to pay his debts. He then sets up the matter alleged to be impertinent as a reason why A. N. Lawrence was not in fact insolvent in 1834. The matter thus set up embraces about twenty-five folios in the body of the answer, and about one hundred folios of schedules, for the purpose of showing that a mistake was made by the master in taking an account against the defendant, A. N. Lawrence, in a suit in the court of chancery, under which he was obliged to pay about \$38,000 too much to the complainants, about two years before his failure in 1834.

The exception was argued before the vice chancellor of the first circuit, Hon. WM. T. McCOWN, and overruled, and the report of the master confirmed on the 6th January, 1845.

Roberts appealed to the chancellor, who, on the 29th August, 1846, affirmed the order of the vice chancellor, with costs, and gave the following reasons:

“In relation to the suit in this court, under which it is alleged A. N. Lawrence was obliged to pay \$38,000 too much to the complainants, it would be sufficient to say, that even if the matter of the error in that suit could now be inquired into for the purpose of showing that A. N. Lawrence was not insolvent in

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1834, this part of the answer is impertinent on account of its prolixity. For all that was necessary to say for the purpose of raising the question of insolvency in 1834 was, to state that an error of that amount occurred in the suit in 1832, and that if that error could be corrected by him in any way, he was not insolvent in 1834. I know of no way, however, in which that question can be inquired into in this collateral proceeding; and a man is not the less insolvent because he has been obliged to pay a large sum of money under a decree against him, which is alleged to be unjust, if he has no legal or equitable means of recovering it back.

“The vice chancellor and the master were therefore right in supposing that the matter excepted to was impertinent.”

Roberts appealed to this court.

*David P. Hall, Attorney, and
D. Dudley Field, Counsel* for appellant.

First. The matter excepted to was not impertinent, because it was an answer to a distinct allegation of the bill.


Second. If it was proper to answer the allegation at all, it was proper to do so fully, and in such manner as to reconcile the apparent contradiction between a failure and actual insolvency.

Third. The position of the chancellor, that Augustine N. Lawrence was insolvent, though the over-payment was really made, as he alleges, because he had no means of recovering it back, is a mere assumption, unwarranted by the law and the fact. In truth, there is and has long been a suit pending in chancery to recover it back.

Fourth. The exception is bad, because it is too broad. If the matter objected to is expunged, there will remain no answer whatever to the allegation of the bill. It is well settled that if an exception for impertinence can not be sustained in full, it can not be sustained at all. (*Wagstaff v. Brown*, 1 *Russ. & Myl.* 30; *Van Rensselaer v. Brice*, 4 *Paige*, 174; 1 *Beavan*, 571.)


DAVID P. HALL, *Solicitor* for appellant.

DAVID DUDLEY FIELD, *of Counsel.*

 1. Bill to call Roberts to account as agent of testator for

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sale of lands in Oneida. 2. Executors file bill. 3. Executor made defendant on allegation of collusion between him and Roberts. One object of bill is to disavow payments to one of the executors. P. 26, matter to be answered. 38-44, answer to that matter. Answer that he stopped payment for reasons stated, but was not insolvent. If matter in answer struck out, then will no answer remain to the allegations of insolvency. It is an answer under oath. I won't discuss the question, the chancellor has discussed. My complaint is, should not have struck out all. P. 43, fol. 41, "Wherefore, &c.," should have been left in. P. 38, fol. 16, (a) should have been left in.

REPLY.—This point was taken before chancellor. He forgot, from keeping the papers two or three years, as he did in this case. 

David S. Jones, Attorney and Counsel for respondents.

The matters in the answer of the defendant, Seth B. Roberts, to the amendments to the complainants' bill of complaint, and schedules A and B thereto annexed, excepted to by the complainants as impertinent, are impertinent.

First. Because, even if it were competent to the said defendant to prove those matters, and if they were proved, they furnish no answer to the complainants' allegation, that the defendant, Augustine N. Lawrence, did, some time in the year 1834, fail in business, and become insolvent, &c., inasmuch as those matters all refer to a period of time long anterior to 1834.

Second. Because the matters so excepted to, seek to open the accounts of the said Augustine N. Lawrence with the former firm of A. H. Lawrence & Co.; whereas it is not competent even to the said Augustine N. Lawrence, and still less to the defendant Roberts, a third person, to have those accounts opened; inasmuch as a decree of the court of chancery, made more than ten years before filing the said answer, and then in full force, had finally settled those accounts.

Third. For prolixity—inasmuch as the matter of the error in the accounts, which the said answer seeks to open, if any did exist, could have been stated in less than one folio of the answer, and without schedules, whereas, the defendant has occu-

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pied twenty-six folios of the answer and upward of ninety folios of the schedules in stating the same.

D. S. JONES, *Sol'r and of Counsel for Respondents.*
L. ROBINSON, *of Counsel.*

Only point taken here is new. Ought not to be heard here. But there is nothing in the point. Answer only goes to part of the allegation. P. 38, first clause struck out about particulars which should not be in answer. But he has an answer to the amended bill. What precedes and follows the matter struck out makes a full answer. "Wherefore" is mere argument—inference. Master, vice chancellor, and chancellor, have decided this question.

DECISION.—Decree affirmed, unanimously.

Not reported.

NOTE.—Where the defendant, in his answer, went into a long, detailed statement by which he designed to show that there was an error in accounting in a former suit between the parties, whereby he had been unjustly decreed to pay a large sum of money, and thereby was not insolvent as alleged—*held*, that that part of the answer was impertinent, for prolixity. The defendant could have raised the question of insolvency, by a statement of the *fact* of such an error in accounting. (If that question could be raised at all in such a collateral way.)

A man is not the less insolvent because he has been obliged to pay a large sum of money under a decree against him, which is alleged to be unjust, if he has no legal or equitable means of recovering it back.

Not reported.

HALSTED, plaintiff in error, *agt.* SPENCER, defendant in error.

Questions discussed.

1. Whether a *parol agreement* made on the 14th March, 1842, by which the plaintiff let to the defendant certain rooms in her dwelling house for board and lodging of the defendant and his wife, for a stipulated sum to be paid quarterly, *for the term of one year from the 1st of May, 1842*, was void by the statute of frauds—not being in writing?

2. Whether a settlement made with the plaintiff by the defendant in July, 1842, for the occupation of the rooms, to the 1st August, 1842, without board,

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from the 1st of May preceding, whereby plaintiff made a deduction of one half, and the defendant promised that he would not ask any more deductions, but would pay *as he had agreed* to the 1st of May following, was a *new special contract* for the board and lodging of the defendant and his wife?

This was an action of assumpsit brought by Mrs. Spencer, the plaintiff, for \$200, a board bill for one quarter, claimed for the board of the defendant and his wife from 1st of Feb. 1843, to 1st of May, 1843, on contract.

In March, 1842, the defendant agreed with the plaintiff for certain rooms and board for himself and wife from the 1st day of May, 1842, to the 1st day of May, 1843, at \$800 for the year, payable quarterly. No deduction from the price was to be made on account of absence. The defendant to furnish the room. The defendant, on account of the illness of his wife, did not board with the plaintiff during the first quarter, nor occupy the rooms, although he furnished them and had the key and the possession of them. About the 1st of August, 1842, the defendant requested the plaintiff, under the circumstances, to throw off \$100 of the amount due for the first quarter's board, (\$200 being due,) and if she would do so, defendant said he would not ask for any more deductions, whether he and his wife came or not, but would pay the balance of the year at the rate of \$800 a year quarterly, or oftener if the plaintiff wished it, as he had before agreed, and thought his wife would be well enough to commence about the early part of August, but whether she was well enough to commence or not, he would pay at that rate, beginning the first day of Aug. 1842, and ending the first day of May then next. The plaintiff then consented to throw off the \$100 of the \$200, which she did, and the defendant paid \$100 for that quarter. The defendant and his wife did not commence to board with the plaintiff till the 5th of September then next, when they begun and remained till the 1st day of February, 1843, and paid for that time, and also paid for the month of August when they were not there. The defendant and his wife left on the 1st of February, 1843, when he was informed that he would be held responsible for his contract.

The *amended* declaration contained special counts on the

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original agreement made in March, 1842, and on a special agreement made in August, 1842, for nine months; also, a count for use and occupation for the nine months commencing on the first of August, 1842, and the common counts. After the evidence (as above substantially stated) was given, the plaintiff rested, claiming a verdict of \$244.40. It was admitted by defendant, if the plaintiff was entitled to recover at all, it should be for that sum.

The defendant then moved the court—Hon. JOHN W. EDMONDS, Circuit Judge—to grant a non-suit, for the following grounds:

First. Because it was proved by the plaintiff's own witness, that the defendant had fully paid the plaintiff for the time the defendant boarded with the plaintiff. *Second.* Because this was an action of special assumpsit, as appeared by the declaration, brought upon an alleged contract for board and lodging made in March, 1842, to commence the 1st day of May, 1842, to continue one year, to the first day of May, 1843; that such contract was void by the statute of frauds, and the plaintiff could not recover if the contract was proved as laid. (*Citing*, 2 R. S. 2 Ed. 70, § 2; 3 Hill R. 128.) *Third.* Because if the agreement was not within the statute of frauds, and for one year, it was such an agreement that either party had a right to put an end to it, the payment being made quarterly, and therefore the plaintiff could not recover unless she proves that defendant has not paid her for the time he was boarding with her. And the defendant having shown full payment for the time he remained, there is nothing due to the plaintiff, she having shown no damage. *Fourth.* Because the two first counts of the plaintiff's amended declaration are inconsistent with each other and cannot be maintained, being two separate agreements, specially declared upon for the same subject matter, one of which is clearly within the statute of frauds, and the second not sustained by the evidence. *Fifth.* That the first count in the declaration counts upon two different agreements in the same count, inconsistent with each other, which is bad, there being no evidence to support the first count. *Sixth.* That the evidence did not support the allegation in the second count.

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Seventh. There was no testimony to prove a hiring of rooms or apartments in the common acceptance of the term. *Eighth.* That having failed in all her special counts, there are no counts of a general nature under which she can recover for that portion of the board and lodging not actually furnished and not paid for. And there being no arrears, by the plaintiff's own showing, for that which was actually furnished, she is not entitled to recover, and therefore should be non-suited. *Ninth.* That the law does not know of or recognize a constructive feeding and lodging of the person, as nature rebels against such a proposition.

And the said circuit judge did then and there give his opinion, and decide to deny the said defendant's motion for a non-suit, and decided that there was sufficient to give the cause to the jury; and to which said opinion and decision of the said circuit judge, the said defendant, by his said counsel, did then and there except. And thereupon a verdict was rendered for \$244.40.

The supreme court affirmed the verdict, and rendered judgment for the plaintiff. No written opinion was delivered by the court.

This cause was *previously* tried at the circuit, and a verdict rendered for the plaintiff.

The supreme court—BEARDSLEY, Justice—granted a new trial on these grounds: The declaration (then) contained two counts on the contract for the year, but *no count* on a contract for three quarters of a year. And as the contract for the year was proved to have been made in March, to commence the succeeding May, it was therefore *held* "not to be performed within one year from the making thereof," and was *void*, not being in writing. (2 R. S. 135, § 2.) The circuit judge so held; but he erred in admitting testimony under the counts to prove a special contract (not counted upon) for three quarters of a year.

It was also *held*, that the circuit judge erred on that trial, in holding and charging the jury that the plaintiff was entitled to recover full pay, according to the price agreed upon, for the last quarter of the year, although the defendant neither occupied the rooms nor had board with the plaintiff during any part

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of that time. If the contract was valid, and the defendant broke it without just cause, the plaintiff was still only entitled to such damages as necessarily and directly resulted from its violation. (*Wilson v. Martin*, 1 *Denio* 602; *Reported* 1 *Denio* 606.)

On the second trial the defendant brought error, and removed the judgment into this court.

Bell & Coe, Attorneys, and
Wm. H. Bell, Counsel for Plaintiff in Error.

First. The only agreement by the plaintiff in error with the defendant in error, in relation to obtaining board and lodgings from her, was made in March, 1842. (Page 14.) That agreement was void in law.

1. Because it was not to be performed within one year from the making thereof by its terms. (2 *Rev. Stat.* 135, § 2, *sub.* 1; *Wilson v. Martin*, 1 *Denio*, 602 and 608; *Bearegivelle v. Heald*, 1 *B. & Ald.* 723; *Drummond v. Burrell*, 13 *Wend.* 307; *Shute v. Dorr*, 5 *Wend.* 204.)

2. It was not a contract for the hiring and letting of real estate. (*Wilson v. Martin*, 1 *Denio* 602, 4.)

Second. The settlement made with the defendant in error, in August, 1842, for the occupation of the rooms without board, from the 1st of May preceding, did not constitute a new contract for board and lodging. The plaintiff in error said he would not ask for any more deductions, but would pay as he had agreed. The deduction of \$100, from an illegal claim of \$200, did not constitute any consideration on the part of the defendant in error. (3 *Hill*, 128; 15 *Wend.* 406; 2 *Hill*, 487.)

Third. The motion for a non-suit should have been granted.

Fourth. The judgment of the supreme court should be reversed. As the defendant in error cannot recover, an award of *venire de novo* would only occasion useless expense.

G. M. Speir, Attorney and Counsel for Defendant in Error.

First. The contract, as laid in the declaration and proven on the trial, was valid and binding upon the parties. The plaintiff in error, about the first of August, 1842, agreed to take the rooms of the defendant in error until the first of May, 1843,

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and furnish them himself at the rate of \$800 a year, payable quarterly, board to be furnished, but no deduction to be made on the account of absence from the house. It was not necessary that the plaintiff in error should occupy the rooms, *it is sufficient that he might have done so.* (2 *Saund. Ple. and Ev.* 486; 8 *T. R.* 327; 4 *Taunt.* 45.)

Second. The contract, made in March, 1842, between the parties for the use of the rooms, with board and lodging for one year, to commence the first of May then next, was, on the following July, affirmed with a slight modification by the plaintiff in error, and acted upon by him. And this contract does not come within the statute of frauds. (*Lockwood v. Barnes*, 3 *Hill*, 128; *Russell v. Slade*, 12 *Conn. R.* 455.)

Third. The plaintiff in error, by his agreement, not attaching any part of the consideration to the board he had for himself and wife, but resting the whole consideration in the use and occupation of the rooms, is liable therefor; and the verdict is upheld by the common counts in the declaration. (1 *Chitty Plead.* 267; *Nelly v. Foster*, 2 *Binney* 4; 1 *Starkie R.* 198; *Williams v. Sherman*, 7 *Wen. R.* 109.)

Fourth. The amount due on the contract was for one quarter, and it is admitted if the plaintiff below was entitled to recover at all, it should be for that sum.

DECISION.—Judgment affirmed unanimously, on the argument.

NOTE.—Where a parol contract for the use of rooms and board was made in March for one year, to commence on the first day of May then succeeding; and about the first of August thereafter a settlement was made between the parties for the first quarter, by which it was agreed that on payment of a certain sum to cancel the debt for that quarter, and a promise by the defendant to go on and make payment as under the original agreement for the remaining three quarters of the year, it was *held*, that the original contract was “not to be performed within one year from the making thereof,” and was consequently *void*. (2 *R. S.* 135, § 2.) That proof for the plaintiff on a claim for the three quarters of the year was inadmissible under the special count on the original contract; it was necessary there should be a count upon the special agreement made in August. The *amended* declaration containing such special count, the proof under it, on the second trial, was properly admitted, and the verdict for plaintiff sustained.

Not reported.

(*This term was held at the City Hall, in the City of New-York.*)

JANUARY TERM, 1848.

(Held at the Capitol in the City of Albany.)

DANKS, plaintiff in error, *agt.* QUACKENBUSH, defendant in error.

Questions discussed.

1. Whether the statute (*Sess. L.* 1842, *p.* 193) extending the exemption of property from execution, applies to debts arising on *pre-existing contracts*?

2. Whether that act, under a retrospective construction, is a law impairing the obligation of contracts, within the meaning of the constitution of the United States?

This was an action of replevin brought in the Onondaga common pleas, in 1843, by Danks against Quackenbush for taking one yellow gelding horse and one two-horse harness—goods and chattels which the plaintiff owned and was in possession of. The defendant pleaded the general issue.

The cause was tried at the May term, 1843.

The counsel for the defendant admitted the taking of the property declared for by the said plaintiff; and thereupon the said plaintiff rested.

The counsel for the defendant then gave in evidence a judgment in the supreme court, which, from the record, appeared to have arisen upon contract, in which Thomas B. Fitch was plaintiff, and Melancthon W. Danks was defendant, for \$83.85 : docketed January 6, 1837 ; and an alias execution issued upon said judgment, which was received by the sheriff of Onondaga Co., January 25, 1843. By virtue of which execution, it was admitted by the counsel for the plaintiff that the property was taken; and it was also admitted that the defendant was a deputy of the sheriff of the county of Onondaga, in which county the said Danks resided and the said property was taken.

It was thereupon proved by the counsel on the part of the plaintiff that the plaintiff was a householder, and had no more

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property than would be exempt from execution by statute of 1842, except one horse, which was the property for the taking of which the suit was brought, and which was proved to be worth about sixty dollars—that he drove another horse with this one, but which horse belonged to another person—that he worked by the day to support his family, and used the said team of horses. There was some testimony offered in behalf of the defence which tended to prove the same point.

After the testimony was closed, the counsel for the defendant then asked the court to charge the jury that: The property declared for by the said plaintiff was not exempt by statute from levy and sale under the above execution; and stated as a reason for this, that the demand on which the judgment, by virtue of which this property was taken, was one arising on contract; and arose and became due, and judgment rendered thereon, before the passage of the “act extending the exemption of certain property from distress for rent or sale under execution;” and that the said act did not apply to such contracts and demands; and also, that said act was in violation of the constitution of the United States.

The said court refused so to charge the jury, but charged—that if they found the said team necessary for the support of his family, that then it would be exempt from levy and sale under execution, by virtue of said act of 1842.

To which charge, and to such refusal to charge as above requested, the counsel for the said defendant did then and there except.

The jury found a verdict for plaintiff, and assessed the value of the goods and chattels specified in the plaintiff’s declaration to \$65. Judgment was docketed June 17, 1843.

The defendant brought error, and removed the judgment into the supreme court. In May term, 1845, the supreme court reversed the judgment of the common pleas, BRONSON, Ch. J., delivering the opinion of the court; and *held*, that so long as the case of *McCracken v. Hayward* (2 *Howard’s U. S. Reports*, 608) stood as the law, the exemption law of 1842, when applied to past transactions, could not be supported. In that

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respect it was in violation of that provision of the constitution of the United States which prohibits the state legislatures from passing laws impairing the obligation of contracts.

Whether the exemption law of 1842 applies to executions for debts which were contracted before the law was passed—*Quere.* *Reported 1 Denio*, 128.

Danks, the plaintiff, brought error and removed the judgment of the supreme court into this court.

Isaac W. Brewster, Attorney, and
A. Taber, Counsel for plaintiff in error.

First. The statute in question makes no exception of executions for debts which had been *previously* contracted, and was evidently intended by the legislature to apply to all executions levied after it went into effect. (*Sess. Laws of 1842*, p. 193; 2 *R. S.* 367, § 22; 2 *Dwar.* 699.)

Second. Before the court will declare an act of the legislature unconstitutional, a case must be presented in which there is no rational doubt. (*Dartmouth College v. Woodward*, 4 *Wheaton's Rep.* 625; *ex parte, McCollum*, 1 *Cow. Rep.* 550.)

Third. The statute in question is not a "law impairing the obligation of contracts," within the meaning of the constitution of the United States.

5 *Howard*, 311-12; 20 *W.* 561-2; 2 *Dwar. Stat.* 703; *L.* 1810, *ch.* 193, § 35; 1 *R. L.* 516, § 15; *L.* 1811, *ch.* 202, § 18; 1815, *ch.* 22; 1824, *ch.* 238, § 35; 2 *R. S.* 427, § 59; *L.* 1830, *ch.* 238, § 1; 1831, *ch.* 300, § 1; 1842, *ch.* 157, § 1; (law in question;) *Story's Const.*, § 400. As to construction of const., *Federalist*, No. 44, only one number on this provision, and that in general way—no particulars.

Obligation of contract is the legal duty to perform it, and the sanctions of that duty.

Remedies on contract don't form part of its obligation; contract merged in the judgment—gone.

Lex loci contractus, which enters into the contract, follows it everywhere. The *remedies* do not follow it to another state or county; they never enter into the contract.

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Obligation is perfect the moment the contract is made; *remedy* has no relation to it.

If remedy is part of the contract, there could be no change of the remedies. (*Story's Const.*, § 1379.)

4 *Wheat.* 200, is distinction between obligation and remedy.

1 *Kent*, 430, the same.

4 *Peters*, 289-90—BALDWIN, J., all these *obligations* I admit.

1 *Howard*, 326, 232—McLEAN, J.

5 *Howard*, 311-12—McLEAN, J.

5 *Howard*, 316—BALDWIN, J.

1 *Howard*, 315-16—TANEY, Ch. J., admits exception laws good.

1 *Howard*, 608, *Law of Illinois*, 332—question whether constitutional—question did not arise.

2 *Howard*, 617-18—question not passed upon there. 🖊️

🖊️ REPLY.—Goes to all laws touching remedy—enters into contract, if any—act abolishing distress for rent void, if this is. 🖊️

Noxon, Leavenworth, & Comstock, Attorneys, and

George F. Comstock, Counsel for defendant in error.

First. The act of 1842, extending the exemption of property from execution, can not, consistently with settled rules, be so construed and applied as to affect pre-existing contracts. (*Gillmore v. Sheeter*, 1 *Freeman*, 466; *S. C.* 2 *Mod.* 310; *Couch v. Jeffries*, 4 *Burr*, 2460; 6 *Bac. Abr.* 370; 2 *Atk.* 36; 1 *Vesey Sen.* 225; 2 *Ld. Raymond*, 1350; *Osborn v. Huger*, 1 *Bay Rp.* 179; *Ham v. Claws*, *id.* 93; *Dash v. Van Black*, 7 *Johns.* 477; *Sackett v. Andross*, 5 *Hill*, 334-7 and 362-5.)

🖊️ By whatever name we call this legislation, whether upon the obligation of the contract or the remedy, it reaches and impairs the obligation of the contract.

Though McLEAN, J., will not distinguish between those laws operating upon *past* and *future* contracts, the distinction has been taken and acted on in the federal and state courts.

Laws of the state enter into and modify the contract—part of the contract. (12 *Wheat.* 213, 357, 368, 259, 284, 295, 325;

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13 *Mass.* 1, 16; 16 *John.* 233; 17 *John.* 108.) No doubt states may change the form of the remedy. (4 *Wheat.* 198.) Not only surrender all his goods—*cessio bonorum*—but future acquisitions—*p.* 200–1—distinction as to imprisonment. There is no obligation in a contract, but in the remedies to compel performance.

Statute frauds don't say contract void, but only that no action shall be maintained on them; and as no action, have always been held void.

May alter mere remedies which do not touch the obligation of the contract. (8 *Wheat.* 1; 1 & 2 *Howard.*)

Second. The act in question, under a retrospective construction, is in violation of that provision of the constitution of the United States which prohibits the state legislatures from passing laws impairing the obligation of contracts, and is therefore void. (*Sturges v. Crowningshield*, 4 *Wheat.* 122; *Green v. Biddles*, 8 *do.* 1; *Mason v. Haille*, 12 *do.* 370, 318, 337; *Bronson v. Kinsie*, 1 *Howard*, 311; *McCracken v. Hayward*, 2 *do.* 608; 1 *Car. Law Repos.* 385; 2 *do.* 428; 7 *Monr.* 11; *do.* 544; *do.* 588; 4 *Litt.* 34; *do.* 53; 5 *Monr.* 98.)

DECISION.—Judgment affirmed, on an equal division of the judges.

JEWETT, Ch. J., BRONSON, RUGGLES, and GRAY, Judges, were for affirming the judgment, on the ground stated in the opinion of the supreme court.

GARDINER, J., delivered a dissenting opinion, in which JONES, JOHNSON, and WRIGHT, Judges, concurred.

NOTE.—Whether the act of 1842, extending the exemption of property from execution, can be applied to executions for pre-existing debts, *Quere?*

This act, under a retrospective construction, held to be in violation of that provision of the constitution of the United States which prohibits the states from passing any law impairing the obligation of contracts.

Reported, 1 Comstock, 129.

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BURCKLE & GEBHARD, EXRS., &c., plaintiffs in error, *agt.* LUCE,
defendant in error.

Questions discussed.

1. Whether, by the death of the plaintiff pending an action of *Replevin*, the action *abates*, and cannot be revived?

2. Where property had been levied upon by a sheriff, by virtue of an execution, and by an action of *Replevin* had been taken from his possession, whether upon the death of the plaintiff, pending the action of *Replevin*, the sheriff had a right to *retake* the property and sell it on the execution?

3. Whether an *execution* issued pursuant to an order of the court, as a *substitute* for the *original*, which was lost, could properly be introduced and received as *primary* evidence?

The defendant was a deputy sheriff of Oswego county, and on the 8th of January, 1840, a *feri facias*, returnable that month, was delivered to him, on a judgment in the supreme court, in favor of Philander Rathbun against Christian J. Burckle, for \$632.85. On the same day the defendant levied on the property now the subject of controversy, as the property of Burckle. (*See Case*, p. 19.) Charlotte Seitz thereupon brought *replevin* against the defendant, and the goods in question were delivered to her by virtue of the writ. (P. 18, 19.) That action was tried and a verdict found for the defendant, which was set aside, and a new trial ordered. Afterward, in the month of February, 1842, and before a new trial was had, Mrs. Seitz, the plaintiff in that action, died, having first made her will and appointed the plaintiffs her executors, who proved the will. After the death of Mrs. Seitz, and prior to the commencement of this suit, the defendant repossessed himself of the goods upon which he had previously levied, and which had been taken from him by the first writ of *replevin*, and claimed to hold them by virtue of that levy. The plaintiffs thereupon, in August, 1842, brought this second action of *replevin*, and retook the same goods. (P. 19.) On the trial, the judge rejected the evidence which the defendant offered for the purpose of showing that Mrs. Seitz had no title to the property, as against creditors, and directed a verdict for the plaintiffs. This

verdict was set aside by the supreme court, and a new trial ordered. (*See 6 Hill, 558.*) Another trial was had in July, 1845, at which the jury found the title to the property, so far as creditors were concerned, to have been in Burckle, at the time of the first levy, and rendered a verdict for the defendant. It is to set aside the judgment entered on this verdict that this writ of error was brought.

On the trial, evidence was given tending to show that the original execution was lost after the levy under it. And that a motion was made to the supreme court that a new execution issue under the seal of the court similar to the original, and that such new execution and the endorsement thereon be of the same validity and effect as the original, which motion was granted. And in pursuance of this order a new execution was issued, and was offered in evidence on the trial. The plaintiffs' counsel objected to the evidence on the ground that the loss of the original was not sufficiently proved. The judge admitted the execution in evidence, and the plaintiffs excepted.

The counsel for the plaintiffs requested the circuit judge (HON. P. GRIDLEY) to charge the jury that even although the conveyance by C. J. Burckle to Mrs. Seitz was fraudulent, yet, that the execution of the writ of replevin by Charlotte Seitz in her life time, destroyed the lien of the execution, and that the defendant had no right under that execution to retake the property. The circuit judge refused so to charge, and the counsel for the plaintiffs excepted.

*Duer & Babcock, Attorneys, and
Wm. Duer, Counsel for plaintiffs in error.*

(Arguments and points on both sides submitted by stipulation.)

The most important question in this case arises from the refusal of the judge to charge the jury as requested by the counsel for the plaintiffs in page 24 of the printed case.

WE CONTEND,

First. That the execution of the writ of replevin, brought by Mrs. Seitz, destroyed the lien of the execution, and that, con-

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sequently, the defendant had no right, under that execution, to retake the property.

The facts briefly are, that the defendant, under an execution against Christian J. Burckle, levied on certain personal property. The property levied on was replevied by Charlotte Seitz, and during the pendency of the replevin suit, Mrs. Seitz died. The defendant then retook the goods.

In favor of the proposition contended for, there appear to be several express decisions, and an absence of all authority on the other side.

The first of these decisions is the case of *Bradyll v. Ball*, (1 *Brown*, Ch. R. 427,) in which it appears to have been expressly decided, after repeated arguments, that there was no such lien either at law or in equity. This decision is confirmed by the cases of *Woglam v. Cowperthwaite*, (2 *Dall.* 68;) *Frey v. Leeper*, (2 *Dall.* 131;) and *Acker v. White*, (25 *Wend.* 614.)

The late chief justice of the supreme court, who delivered the opinion of the court contained in the printed case, (*S. C.* 6 *Hill*, 558,) distinguishes, in two respects, the present case from the cases in *Brown* and *Dallas*: 1st. That in those cases there was a remedy on the bond—2d. That the rights of third persons had intervened.

Whether there was or was not a subsisting remedy on the bond, does not appear from the reports of the cases in *Dallas*. It appears not to have been supposed, on either side, that the fact would make any difference, as no question on the point was raised by counsel or noticed by the court. But in the case in *Brown* it appears distinctly that there was *no remedy* on the bond; for it is stated that all the parties to it were *bankrupts*, which would be a good defence. This point too appears to have been relied upon, the counsel for the plaintiff being reported to have said, "This is a case where the tenant is a bankrupt, and has no goods; the pledges are also insolvent, and the sheriff is not liable for taking insufficient pledges, because, when taken, they were solvent." The want of any other remedy was thus distinctly urged.

It is not perceived, upon principle, how the question whether

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there is or is not a remedy on the bond, though it may be a hardship in a particular case, can make any difference *in the law*. At common law the plaintiff was not obliged to give any security; if upon the writ *de retorno habendo* the sheriff returned *elongata* that the goods had been removed or disposed of, the defendant might have a *capias in withernam* for other cattle, &c., and if that failed, his remedy was gone. (1 *Saund.* 195, *a Bac. Abr. Replevin D. id. E. 5*; *Esp. N. P.* 347, *Replevin.*) The security which the statute requires the plaintiff to give, is a pure benefit to the defendant. If, where there is no remedy on the bond, there is a *lien* which authorizes the defendant, on judgment in his favor, to follow the property replevied into the hands of third persons, then at common law, before the statute requiring pledges *de retorno habendo*, there would always have been such a *lien*. But this is not pretended. Certainly the statute, requiring a bond, gives no *lien* if the bond fails. When then, and how did the bond become a substitute for a *lien* upon the failure of which the *lien* revives? Not by the common law, for by the common law there was no bond; not by the statute, for the statute that gives the bond creates no *lien*.

But it is said that in the cases referred to, the rights of third persons had intervened. In the case in *Brown* these third persons were assignees in bankruptcy. Now it is well settled that assignees in bankruptcy take the property subject to all liens, and in the same plight precisely that the bankrupt held it. (1 *P. Wms.* 737; 1 *Atk.* 94-232; *Lempriere v. Seyds*, 2 *T. R.* 485; 2 *Vern.* 566; 5 *Barn. & Ald.* 70.) This principle was urged by the counsel for the plaintiffs, and it seems not to have been disputed. "Here we are contending on the same ground as if it were with the tenant himself." "The assignees are liable to all the equity to which the bankrupt would be liable." Either this case is not law, or the law is that the replevin destroys the *lien* entirely.

In the case of *Woglam v. Cowperthwaite*, goods had been distrained for rent, and were replevied. The defendant obtained judgment, and on the writ *de retorno habendo* the goods were seized by the sheriff: but in the mean time another

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landlord had distrained on the same goods, and he brought the suit in question against the sheriff for this taking. Here there was no sale, but a question between two liens acquired in precisely the same manner, and of which that under authority of which the defendant claimed was prior in time. One of the questions in the case was, whether the plaintiff, in consequence of certain irregularities, had not lost *his* lien; and the court, after coming to the conclusion that he had not as against the tenant, continues: "If not defeated as against the tenant, he could not be defeated as against the first distrainor, who had no better right than the tenant himself had, *unless the original lien had continued.*" It will thus be seen that the decision was put upon the ground, not of a paramount title acquired by a third person, but of an entire absence of lien in the first landlord after the replevin.

But if the mere intervention of the rights of third persons destroys the lien, there is such intervention here. The executor may have claims that could not be sustained by his testator. Thus he may treat as void a sale made by the latter, and binding on him, but which is fraudulent as to creditors. (*Babcock v. Booth*, 2 Hill, 182.) In *Dox v. Backenstose*, (12 Wend. 543,) Chief Justice SAVAGE says, that under our present statutes, "executors and administrators have a new character, and stand in a different relation from what they formerly did to the creditors of the deceased persons with whose estates they are entrusted. They are not the *mere representatives* of their testator, or intestate—they are constituted trustees, and the property in their hands is a fund to be disposed of in the best manner for the benefit of creditors." These remarks are cited with approbation by BRONSON, Ch. J., in the case immediately before cited.

The chief justice, in his opinion, says: "Mrs. Seitz, without any right to the property—for so we must take the fact to be—obtained the possession by virtue of her writ of replevin. The suit then abated by her death. She only acquired a temporary right to the possession by the replevin; for on a judgment for the defendant, to which he was clearly entitled, he

might have a return of the goods. When the writ abated, I do not see why the temporary right of possession which she acquired by it did not fall with it. I admit that third persons, who in the mean time have acquired rights under her, could not be disturbed. But the right of no third person had intervened. The plaintiffs, as executors, have taken her place. They have succeeded to her rights and nothing more. I think the lien of the execution was only suspended by the replevin, and that it revived when the suit abated."

It is not seen why these remarks (*mutatus mutandis*) are not just as applicable to the case of *Bradyll v. Ball* as to the present case, nor why the decision in that case is not a perfect answer to them. The only difference is, that in that case, instead of the suit abating, there was judgment for the defendant and a writ *de retorno* sued out. In that respect this is certainly a stronger case for the plaintiffs; and we only understand the chief justice to contend that the abatement of the suit gives the defendant the same and not other nor greater rights than its determination by a judgment in his favor. The chief justice continues: "Suppose there had been a trial and judgment for the defendant for a return, and *the goods had been actually redelivered to him*, there can be no doubt but that the lien of the execution would have revived, and that the defendant could sell by virtue of the original levy: and why should not the lien revive in the event which has happened?" We doubt not that in the case supposed it would be the right and duty of the officer to sell under the execution, nor that he would have a *lien* on the goods; but the lien, we submit, would be by virtue of the new writ *de retorno habendo*. So far as the argument goes to show that there would be lien on the judgment for a return, and *before* the delivery to the defendant, we may answer the question by another. Why, if this be so, is there any necessity for or use in an execution *de retorno*? Why may not the defendant, in all cases where he has judgment for a return, (as he has here undertaken to do without such judgment,) retake the property? Yet such a thing was never heard of.

When the defendant obtains judgment for a return, he may issue his writ *de retorno*, and if the property still continues in the hands of the defendant, it may be taken and delivered to him. Possibly it might be so taken in the hands of assignees in bankruptcy, or as here of executors; but this would be by the efficacy of the new writ, and not by any revived lien.

There is no warrant in the adjudicated cases for the motion that the replevin only suspends and does not destroy the lien. No one ever supposed that if such a lien continued, its exercise was not *suspended* during the continuance of the replevin suit. The only question that has ever been made, has been whether the lien was merely suspended, or whether it was totally destroyed. That question has always been decided the same way. The case in *Brown* seems to have been an experimental one; for as the counsel for the defendants there remarked, the case must have often happened. And then so little confidence had the counsel in any legal lien, that they sought relief in equity, and were driven to a court of law by the order of the commissioner. And in that court the principle was unanimously affirmed as always before understood and implied, and which seems to flow from the nature and proceedings of the action, that after the replevin there was *no lien*.

This may be considered a case of hardship. Such cases must occur under any system; but for this reason well-established principles are not to be overthrown. The situation of the defendant in replevin is much better than at common law. If the law is still defective, it is for the legislature to amend it. But after all, the judgment creditor still retains his remedy against the debtor. We suppose there is no doubt under the circumstances that the court would allow him to issue another execution. (*Adams v. Smith*, 5 Cowen, 280.) That he should have done, and he might have levied again on this same property.

If from considerations of hardship the maxim of *stare decisis* should ever be disregarded, there is in this case room for choice. It is said the condition of the bond does not cover the case. The words of the condition are, "that the plaintiff

will prosecute the suit to effect." Apparently the suit brought by Mrs. Seitz was not prosecuted to effect, since, at its termination, matters were left *in statu quo*. We believe no construction has ever been put by the courts of this state upon these words as contained in our statute.

Again it is said that the first replevin suit abated by the death of Mrs. Seitz. There is a decision to that effect in our reports, (*Webber v. Underhill*, 19 *Wend.* 447;) but from that decision the chief justice dissented, and the judge who delivered the opinion of the majority of the court, admitted that the question was "rendered difficult" by "the apparent conflict of positive authority."

Second. If there were any subsisting right to the property by virtue of the levy, yet the plaintiffs, being in possession under process and by authority of law, their possession could only rightfully be changed by the order of the court and under new process; or else (possibly) by the institution of a suit after demand and refusal.

It is argued that in consequence of the abatement of the first suit, the defendant is in the same position as if he had obtained judgment for a return. But if he had obtained such a judgment, it would not, *per se*, have authorized him to seize the property. It would have been necessary to issue a writ *de retorno*. He should therefore have applied to the court for leave to issue such or some other writ applicable to the case, or to make a second levy *nunc pro tunc*.

Third. The copy of the execution annexed to Rathbun's deposition was improperly admitted in evidence, there being no legal and sufficient proof either of the loss of the original execution, or of the paper offered being a copy of such original execution.

AS TO LOSS.

1. The execution having been traced to the possession either of Judge Gridley or of Joshua A. Spencer, (*Case*, p. 19,) both of these gentlemen should have been called to show its loss. (1 *Phillips' Evid.* 456; *Cowen & Hill's Notes*, 1224.)

2. At any rate it should have appeared that a *subpœna duces tecum* was served upon them. (*Ibid.* 1231.)

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3. A search by *Hamilton Spencer* could not supply the defect; there are a few cases where a thorough search by a third person has been held sufficient, but only where it has been made *under the direction* and with the assistance of him to whom the possession has been traced, and when it has appeared that the witness has had access to all the papers of such person. (*Cowen & Hill's Notes*, 1228.)

4. And even this had been held insufficient. (*Id.* 1226-7.)

5. But there is no legal proof of a search by Mr. H. Spencer. He states, (p. 21,) that he has but an "indistinct recollection" even of Rathbun's calling on him; and the statements of Rathbun on this subject (and so of his inquiries of Judge Gridley) being hearsay, are inadmissible. (*Id.* 1217, 562, 1229, 1226-7; and *Parkins v. Cobbet*, 1 *Carr. & Payne*, 282, and cases there cited.)

6. The search must be diligent and thorough; of which there is here *no* proof; the only legal evidence being, that the witness (Mr. Spencer) had an "indistinct recollection" of such an occurrence. (*Cowen & Hill's Notes*, 1224, 1229-30.)

7. There are none of those circumstances here, as worthlessness of paper, interest of party having custody to destroy it, or lapse of time, which excuse a less diligent search. (*Id.* 1224.)

AS TO EVIDENCE OF THE PAPER BEING A COPY.

1. The witness Rathbun does not profess to testify in the slightest degree from any *recollection* of the contents of the original execution and endorsements. The single question is whether the paper is a copy. Rathbun swears (p. 20) in general terms that it is a "copy of said original execution and endorsements;" but he is not to be understood literally; for he swears at the same time that it is a copy of a copy. He means no more than that according to his belief its contents are the same as those of the original execution. Mr. Talcott says it is an exact copy of an alleged copy on which a motion was made for leave to issue a new execution. (P. 21.) From what that was copied, if from anything, there is no evidence. The endorsement of levy is in *defendant's hand-writing*, (p. 20,) and must have been made after the loss of the original, as this

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was issued in pursuance of the rule of the supreme court, (p. 21,) and there is no evidence of what it is a copy, if of anything. At the most this is the *copy of a copy*. If there were no examined copy or copy from the original *in existence* with which the paper produced was compared, then such paper is in no sense a copy. If there were a copy from the original in existence, that should have been produced. (*Cowen & Hill's Notes*, 1240, and cases cited; *Liebman v. Pooley*, 1 *Stark. Rep.* 157.)

2. The only case in which a second copy has been admitted, is where the same person has compared the first copy with the original and the second copy with the first. (*Robertson v. Lynch*, 18 *J. R.* 451; *Winn v. Paterson*, 9 *Peter's Rep.* 663, and *Cowen & Hill's Notes*, 1240.)

3. The endorsement of levy appears to be in the handwriting of Stephen Luce, the defendant; Luce should have been sworn to verify the copy, and also, under the circumstances, to show loss of original. (*Cowen & Hill's Notes*, 1231-2, 1218.)

4. Even if the paper were admissible as the copy of a copy, there is no such authentication as the law requires. The copyist should have been called, or some person who compared it with the copy, and can speak as to its accuracy. (1 *Phillips' Evid.* 386, *Kearny v. Scrope*, 2 *Wald. Rep.* 76; *Cowen & Hill's Notes*, 1065; 5 *Wend. Rep.* 387; *Brewster v. Countryman*, 12 *Wend.* 446.)

Fourth. The order made by the supreme court, and the fact that the execution offered in evidence was issued under such order, (Case, p. 21, 22,) afford no evidence either of the loss of the original execution, or that the one so offered was a copy.

We suppose that the intention of the rule of the supreme court was, that for all purposes of future action the execution issued should have the same force as the original.

But the supreme court were of the opinion, on the argument of this case, that it was to be considered *the original*. It may be so by a fiction of the law; but such fictions are never to be allowed to prevail against justice. It manifestly appears in

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fact that it is *not* the original. We say no execution was ever issued. It may be true in this case that there was one, and that it was valid. But the principle of the supreme court would prevent us from showing this affirmatively and by the clearest evidence. We cannot be estopped by the rule in question. It was made in another suit and between other parties. This rule, as between the parties to the suit in which it was made, determined a certain fact, namely, that a certain paper was a copy of another. Even a judgment, except as between parties and privies, proves nothing but the fact of its rendition. Can this rule have a higher effect? We admit we are bound by it as an execution from the time it was made. But a claim is set up under a levy made before its existence. It is physically impossible that it can be the original; to make it so in fact is out of human power. If there is no estoppel, what principle is there that prevents us from showing the truth?

It was said on the argument that this point had been several times determined. We are aware that where papers in a suit have been lost, new ones have been allowed to be made out; but we have not found a case where third persons, having rights depending on the existence of the original, have been held estopped from showing the truth.

But if there were any estoppel here, it was waived. The defendant did not offer and rely on his execution as an original. He offered it as a copy, and showed by his own evidence the truth of the case.

If there is no estoppel, then the rule of the supreme court can, of course, have no effect as evidence.

Fifth. The judge should have charged the jury, as requested by the counsel for the plaintiff, with respect to the question of fraud, (p. 23-4,) and his charge, connected with the refusal to do so, necessarily tended to mislead the jury.

It will not be denied that in *this* case the whole question, as to fraud was for the jury. But the judge refused so to charge—said the proposition was *not universally true*—gave an instance where it was not so, and left the inference open to the jury that it was not true in this particular case. This view was

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confirmed by what follows, that it was proper for the court to give the jury "*instructions as to what had been regarded by the court as badges and indicia of fraud, &c.*" It is the duty of a judge, when requested to charge on a matter of law applicable to the case, either to do or to refuse to do so explicitly; and an evasion that leaves or tends to leave a false impression upon, or to confuse the jury, is matter proper for an exception.

Talcott & Harmon, Attorneys, and

N. Hill, Jr., Counsel for Defendant in Error.

First. The action brought by Mrs. Seitz abated by her death in February, 1842, and could not be revived.

1. By the common law, all actions of tort, including replevin, abated by the death of the plaintiff, and could not be revived. (*Ormond v. Bierly, Carthew's Rep.* 519; *Cutfield v. Corney, 2 Wils. Rep.* 83; *Miller v. Langton, 1 Harp. Rep.* 181; *Webber v. Underhill, 19 Wend.* 449.)

2. The statute has not changed the common law rule, (2 *R. S.* 576, § 2,) but was intended merely as declaratory of the previously existing law. This appears from the notes of the revisers, and from the inconveniences which would arise from any other construction. (3 *R. S.* 786, 2d ed.; *Webber v. Underhill, 19 Wend.* 447; *Burckle v. Luce, 6 Hill, 553.*)

3. The decisions in Massachusetts on this question are founded upon a statute, which expressly declares, that "when any action or suit shall be depending, &c., and it shall so happen that either party be taken away by death before final judgment, the executor or administrator of such deceased party, who was plaintiff, &c., *in case the cause of action doth by law survive, shall have full power to prosecute, &c., until final judgment.*" (1 *Laws of Mass.*, 122, § 10, ed. of 1801.)

4. Our statute is essentially different. It provides for a revival by *scire facias*, where the cause of action survives, in one event only; viz.: *if the plaintiff shall die after interlocutory judgment.* (2 *R. S.* 386-7, §§ 2, 3; 19 *Wend.* 454-5; 9 *Metcalf*, 440.)

Second. The verdict finds that the pretended title of Mrs. Seitz

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was fraudulent and void, and that she had no property in the goods. Her writ of replevin did not divest the defendant of the lien acquired by virtue of his levy, but merely suspended it, and gave Mrs. Seitz the right of possession during the pendency of the suit. When she died, therefore, and the suit was thus brought to an end, the defendant had the right to retake the property, and proceed with his execution.

1. The action of replevin was not designed, either by the common law or by statute, to enable the person resorting to it to acquire *a title* by the mere act of replevying, but only to enable him to hold *the possession*, while the suit was pending. Indeed, to say that *the title* may be thus changed, would be recognizing the doctrine that a man can be divested of his right without his consent, and without the semblance of a trial, or an opportunity of being heard, which is contrary to first principles. (*Burckle v. Luce*, 6 *Hill*, 558; *Lockwood v. Perry*, 9 *Metcalf*, 440; 1 *Hill*, 139, *per* BRONSON, J.; 4 *Hill*, 144-5, *per* BRONSON, J.)

(*Manuscript.*)

Fassett & Whitlock sued Yates in replevin for a canal-boat, and took the property by virtue of the writ. Yates pleaded *non cepit*. On the trial, Yates proved the property out of the plaintiffs in that suit and in himself, but could not get a judgment for a return under his plea. Yates afterward, and after a demand and refusal, sued Fassett & Whitlock in *trover* for the canal-boat in question. Fassett & Whitlock set up as defence in that suit, that the property having been taken from Yates by a writ of replevin in their favor, and *no judgment for a return having been rendered in the replevin suit*, that he (Yates) could not maintain an action for the property or its value. But the court decided that Yates could maintain that action, and gave him judgment. (*Yates v. Fassett & Whitlock*, *MS.*, *Old Supreme Court*, *October Term*, 1847.)

2. The bond to be given by the party replevying, is not a substitute for the property, but a mere security that it shall be safely kept during the pendency of the suit, and restored afterward, if such shall be the judgment of the court. The reason for requiring a bond was, that the writ of replevin took *the possession* from one who was *prima facie* the owner, without trial, and without his consent, and hence it was deemed just that he should have some additional security for its return

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beyond the responsibility of the party taking it. (9 *Metcalf*, 446, *per* DEWEY, J.; 6 *Hill*, 559 to 561; *Willkinson on Repl.*, 1, 2, 3, 11, 112; 2 *R. S.* 523-4, § 7, *sub.* 2.)

3. The cases relied on by the plaintiffs in error are not consistent with the true theory and principle of this action. But conceding them to be sound, they go no further than to say, that where replevin is brought for goods distrained; and a *third person acquires rights* under the plaintiff, pending the action, the defendant must, *as against such third person*, proceed to judgment *de retorno habendo*, and then resort to his remedy upon the bond. This is not such a case. (*See* 6 *Hill*, 559, 560.)

4. The defendant had no remedy upon the bond given by Mrs. Seitz upon issuing the writ of replevin; she having died pending the action. (6 *Hill*, 561; 1 *Pick.* 285; *Carthew*, 519.)

Third. The circuit judge committed no error in receiving the evidence relating to the execution.

1. The execution introduced was issued pursuant to the order of the supreme court, as a substitute for the first execution, which was lost; and was therefore properly received as *primary* evidence. (*See Case*, p. 20, *Rathbun's Testimony*; 21, *Talcott's Testimony*; 20-1, *Rule of Court*.)

2. The courts have always exercised the power of supplying lost papers in this way, and the substituted paper takes the place of the original, for all purposes. (*Jackson v. Hammond*, 1 *Caine's Rep.* 496; *Daysell v. Bridge*, 2 *Strange*, 1264; *Douglass v. Gallup*, 2 *Burrow's Rep.* 722.)

3. But if the question was one of *secondary* evidence, the proof given was clearly sufficient to show that reasonable diligence had been used to obtain the original, and this is all the law requires. (*See Case*, pp. 19, 20, *Rathbun's testimony*; 21, *Spencer's testimony*.)

4. The law does not require the *utmost* diligence to be shown, in order to excuse the non-production of the original; but only requires evidence of such reasonable diligence as will satisfy the court that a *bona fide* effort has been made to obtain the original, and that it is not withheld through any fraudulent design. (*Cowen & Hill's Notes*, pp. 1223-4, and the cases there cited.)

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5. The testimony requisite to lay the foundation for secondary evidence, depends upon the circumstances of each particular case. In the present instance, all the preliminary evidence was given *without objection*, and its sufficiency was a *question of fact*, on which the judge has passed. The court will not disturb his decision, even if it were against the preponderance of evidence, which we deny. (*Cowen & Hill's Notes*, pp. 1233-4; 1501.)

6. The judge, in deciding preliminary questions of this character, sits in the place of a jury, and error will not lie, unless he decides *contrary to the evidence*. (*Cowen & Hill's Notes*, p. 1501, and the cases there cited.)

Fourth. The circuit judge committed no error in charging the jury. He left the whole case to them, with instructions to find whether the assignment was made in good faith, without intent to defraud creditors. Nor did the judge err in refusing to charge the jury as requested. Indeed, it will be seen by an examination of his charge that he substantially complied with the request.

Fifth. This being an action against a public officer, for an act done by virtue of his office, the defendant is entitled to double costs.

DECISION.—Judgment affirmed.

JEWETT, Ch. J., delivered the opinion of the court.

NOTE.—*Held*, that the proceedings upon the original writ of replevin conferred upon Mrs. Seitz a mere temporary right of possession, which expired with the abatement of the suit by her death, and that when that event occurred, the lien of the execution revived. No rights of third persons having intervened under her, the defendant was at liberty to retake the property by virtue of his former levy.

The plaintiffs in this (2d) suit as executors succeeded to the rights of Mrs. Seitz, and nothing more.

The action brought by Mrs. Seitz abated by her death, and could not be revived by *scire facias*.

Also *held*, that there was no necessity of proving the loss of the original execution upon the trial in order to give in evidence its substitute ordered by the supreme court.

Reported 1 Comstock, 163.

McKEON, plaintiff in error, *agt.* GRAVES and BEST, defendants in error.

Questions discussed.

1. Whether a declaration in a justice's court in the following form, is good in form or *substance*? to wit: "The plaintiffs appeared and declared against the defendant in an action of trespass, and for breaking in and destroying, and taking from the premises of plaintiffs certain boards and other fencing stuffs, and converted the same to his own use."

2. Whether an action of *trespass quare clausum fregit*, may be brought in a justice's court of a different county from that in which the land lies?

Richard Graves and Eli Best brought an action of trespass for taking boards and fencing stuff in a justice's court, against James McKeon, and recovered judgment (the defendant not appearing) for damages and costs, \$16.84. McKeon brought a *certiorari* to the Columbia common pleas, to which the justice made the following return:

"Columbia County, *ss.*: I, Francis W. Bradley, the justice of the peace in the said writ hereto annexed named, do certify to the judges of the court of common pleas of the said county, that before the coming to me of the said writ, to wit, on the 15th day of October, 1844, at the request of Richard Graves and Eli Best in the said writ named, I issued a summons directed to any constable of the said county, commanding him to summon James McKeon, in the said writ also named, to appear before me at my office in the town of Kinderhook on the 22d day of October then instant, at ten o'clock in the forenoon, to answer unto Richard Graves and Eli Best in a plea of trespass, to their damage of \$100; which summons, on or before the return day thereof, was delivered to me by William H. Thompson, a constable of said county, with a return thereon signed by him, that the same was personally served by him on the said James McKeon on the 16th of October afore-said: and I do also certify that at the time and place above specified for the return of the same summons, the plaintiffs appeared and declared against the defendant in an action of trespass and for breaking in and destroying and taking

from the premises of plaintiffs certain boards and other fencing stuff, and converted the same to his own use.

“Defendant did not appear.

“James Deyo was then sworn as a witness on the part of the plaintiffs, testified that he knows the parties, has lived in the house with the defendant. I saw the defendant take boards from the plaintiffs’ fence, and fetch them in his own yard and make a small fence around his garden; the boards were all missing from the yard about the time the defendant moved away, and thinks defendant took them away; thinks there were fifty panels of fencing stuff taken away; thinks it worth about \$16. On which I, the said justice, did render judgment against the said defendant for the said sixteen dollars damages and eighty-four cents costs.”

The common pleas reversed the judgment of the justice with costs. Graves and Best brought a writ of error, and removed the proceedings and judgment to the supreme court, where the judgment of the common pleas was reversed, and that of the justice affirmed. (*Reported 2 Denio, 639.*)

Several preliminary and minor objections were taken to the justice’s judgment, and argued in the supreme court by the counsel, and were likewise argued in the court of appeals. They are noticed by JEWETT, J., in the introductory part of his opinion in the supreme court, but do not appear in the reported case, to wit: “The summons was returnable before the justice on the 22d day of October, at ten o’clock, A. M., at his office in the town of Kinderhook.” The justice in the general part of his return certifies, “that at the time and place above specified for the return of the same summons the plaintiff appeared and declared,” &c., and that the “defendant did not appear.” It is claimed that the judgment of the justice was erroneous, on the ground that the return shows that the justice did not wait one hour after the time specified for the return of the process, as required in such case by the statute. (2 R. S. 234, § 46.) I think we are bound to intend that the justice did wait the hour required in such case. I regard the return in this particular as merely formal, not designed to

answer any allegation contained in the affidavit on which the certiorari was allowed. It is quite probable that no such question was raised by the affidavit. At all events, if the defendant relied on that objection, he should have procured a direct answer negating the fact that he did wait the hour. Before a judgment can be reversed, it must appear affirmatively that the justice has erred. This principle is well settled. (*Fuller v. Wilcox*, 19 W. 351; *Oakley v. Van Horn*, 21 W. 305; *Baum v. Turpenny*, 3 Hill, 75.)

It is also objected that the declaration before the justice was defective in both form and substance. It is undoubtedly bad on special demurrer, (*Timmerman v. Morrison*, 14 John. 369,) and unquestionably good in a justice's court on general demurrer. (*Keyser v. Shaver*, 2 Cow. Rep. 437; *Grigg v. Griswold & Corning*, 1 Denio Rep. 432; *Stone v. Case & Keeler*, 13 W. 283.)

And besides, the statute (2 R. S. 257, § 181) requires the court of common pleas, in cases brought from justices' courts by certiorari, to give judgment in the cause as the right of the matter may appear, without regarding technical omissions, imperfections or defects in the proceedings before the justice which did not affect the merits.

The statute in relation to amending pleadings, &c., (2 R. S. 424, § 7,) also provides that no judgment recovered as therein stated shall be reversed, &c., by reason, among other things, of any "insufficient pleading;" for the want of any allegation or averment on account of which omission a special demurrer could have been maintained; "for omitting any allegation or averment of any matter, without providing which the jury ought not to have given such a verdict." That these provisions extend to a justice's court, so far as they are applicable, is evident, not only from the language of sec. 10 of the act, which in express terms extends them to *all actions in courts of law*, but is provided by statute, (2 R. S. 252, § 1,) that "every justice of the peace elected in any town in this state, &c., is hereby authorized to hold a court for the trial of all actions in the next section enumerated, and to hear, try and determine

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the same according to law and equity; and for that purpose; where no special provision is otherwise made by law, such court shall be vested with all the necessary powers which are possessed by courts of record in this state." (See also *Brace & others v. Benson*, 10 W. 213.)

An objection is raised, that the evidence was not sufficient to sustain the declaration. I think it was, *prima facie*. There is no variance between the declaration and the proof. The declaration was for trespass and for breaking in and destroying and taking from the premises of the plaintiffs certain boards and other fencing stuff and converting the same to his own use. The proof was, that the defendant took boards, about fifty panels, from the plaintiffs' fence and used them in making a fence around his own premises, temporarily, and finally otherwise disposed of them. This evidence was sufficient to authorize a court or jury at least to infer, a *breaking in* the premises from which the boards were taken. But it was not necessary under this declaration in order to recover, to prove every act of trespass complained of. The declaration does not allege that the trespass consisted in the defendant's breaking and entering a *certain* close of the plaintiff and *then and there* taking and carrying away certain boards, &c., of the plaintiff. It does not allege the taking the boards to be part of a trespass in which the *breaking* of the close was the principal thing, as in *Howe v. Wilson*, 1 Denio, 181. That case sustains this principle, that when a count in a declaration for a trespass *quare clausum fregit* also alleges the taking of goods *in that close*, it so far operates by way of description that if the plaintiff failed in his proof of the *local* trespass, he would also fail as to the trespass to the goods.

The judge then proceeds with the principal point in the case, as reported in 2 Denio. The objection of the defendant being, that it did not appear *affirmatively* that the premises on which the trespass alleged to have been committed were situated in the county of Columbia; and that such an action at common law is local, and unless the lands were situated in the county where the action was brought and tried, the justice had no jurisdiction. It was *held*, that the legislature had conferred jurisdic-

tion upon justices of the peace of the action of trespass on lands whether the cause of action arose in the county where the justice resided or not. (2 R. S. 225, § 2; *Laws*, 1840, *ch.* 317, § 2; *Sumner v. Finegan*, 15 *Mass. R.* 280; *Statutes of Mass.*; *Pitman v. Flint*, 10 *Pick.* 504; *Morton v. Chase*, 15 *Maine R.* 188; *Hopkins v. Haywood*, 13 *Wend.* 265; 1 *Cowen's Treatise*, 27, 28.)

Also *held*, that although the courts of common pleas in this state have not original jurisdiction in such actions of trespass, &c., yet they have jurisdiction of such actions on *certiorari*, or on appeal from justices' courts.

Also, that the court cannot intend that such a trespass was committed on land situated *out of the state*, where it appears that the justice had jurisdiction of the parties and generally of the subject matter.

McKeon the defendant brought a writ of error and removed the judgment into this court.

John H. Reynolds, Attorney and Counsel for plaintiff in error.

First. The return of the justice shows that the proceedings before him were entirely *ex parte*—the plaintiffs only appearing. Nothing, therefore, can be inferred against the defendant. The plaintiffs were bound to show a case within the jurisdiction of the court affirmatively, or the judgment cannot be sustained. (*Northrup & Huntley v. Jackson*, 13 *Wend.* 85; *Yager v. Hannah*, 6 *Hill*, 631; *McNutt v. Johnson*, 7 *Johns. R.* 18; *Stewart v. Smith*, 17 *Wend.* 517; *Squier v. Gould*, 14 *Wend.* 159; *Finch v. McDowell*, 7 *Cowen*, 537.)

Second. The return does not show jurisdiction of the *person* of the defendant, at the time of rendering the judgment. The summons was returnable at 10 o'clock, and "at the time" "for the return of the same summons, the plaintiffs appeared and declared," &c.; and the justice rendered judgment without waiting the *hour* required by statute. The justice had no authority to proceed in the cause until the hour had expired. (2 R. S. *old ed.* 233, *new ed.* 165, § 46; *Hoes v. Sherrill*, 16

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Wend. 36, *per* BRONSON J.; *Hart v. Seixas*, 21 *Wend.* 56, *per* BRONSON J., *Stewart v. Smith*, 17 *Wend.* 517.)

Third. The declaration before the justice was bad in form and substance. It does not show a case within the jurisdiction of the justice. The *place* where the trespass was committed is not stated. The action of trespass *quare clausum fregit* being *local*, the *place* where the trespass was committed was material. (*Houghton v. Strong*, 1 *Caines R.* 486; *Grover v. Gould*, 20 *Wend.* 227; 1 *Salk.* 404 *and note*; 2 *Ld. Raym.* 795; 2 *Wilson*, 16; 1 *T. R.* 151; 1 *Saund.* 74, *and note* (1); *Rex v. Danser*, 6 *T. R.* 243; 1 *Cowen's Trea.* 364, 551, 665, 661; 9 *Mod.* 95, *Lord Conynsly's case*; *Thornton v. Smith*, 1 *Wash.* 81; 2 *Bac. Ab. title "Court,"* (4); 3 *Wend.* 267; 6 *id.* 638; 7 *id.* 436; 1 *Chitty pl.* 9 *ed.* 260, 267; *Read v. Pope*, 1 *Crom. Mees. & Rosc.* 302; 1 *T. R.* 241; 1 *East.* 278.)

☞ Don't show was *within the state*—and none of our courts have *jurisdiction* of trespass on land in other states. ☞

Fourth. The proof was insufficient to maintain the action.

1. Because it does not show that the plaintiffs were in the possession of the premises. Such proof was necessary. (4 *Kent Com.* 4th *ed.* 119; 1 *Cowen's Trea.* 370, *and cases cited*; 12 *Johns. R.* 183; 9 *id.* 61; 1 *id.* 511; 3 *id.* 468; 8 *Mass. R.* 415.)

2. Because it does not show a cause of action within the jurisdiction of the court; it not being shown where the *locus in quo* was situated. (*Watts v. Kinney*, 23 *Wend.* 484; *same case*, 6 *Hill*, 82, *and cases cited.*)

3. There is no legal evidence of the conversion of the boards by the defendant, or of damages, upon which a judgment ought to be rendered.

Fifth. There is a fatal variance between the declaration and proof. The declaration is for "breaking in" and "destroying, and taking *from the premises* of plaintiffs" certain boards, &c. The proof, at most, shows only a simple *taking* of the boards. There is not a shadow of proof that the defendant entered the plaintiff's premises. (*How v. Wilson*, 1 *Denio*, 181.)

Sixth. A justice's court being a limited and inferior court,

the facts showing its jurisdiction over the person of the defendant and the subject matter of the action must be shown *affirmatively*, and nothing will be *intended* in favor of its jurisdiction. (*Jones v. Reed*, 1 *Johns. Cases* 20; *Welks v. Newkirk*, *id.* 229; *Powers v. The People*, 4 *Johns. R.* 292; *Bowman v. Russ*, 6 *Cowen*, 234; *Mills v. Martin*, 19 *Johns. R.* 33, 39; 6 *T. R.* 245; 4 *Burr*, 2108; *Ladbroke v. James*, *Willes R.* 199; *Sallers v. Lawrence*, *id.* 416; *Doug.* 97; 7 *T. R.* 305; *Wise v. Withers*, 3 *Cranch*, 331; *Moravia v. Sloper*, *Willes*, 30; *Morse v. James*, 122; *Thomas v. Robinson*, 3 *Wend.* 267; *Cleveland v. Rogers*, 6 *Wend.* 438; *Sheldon v. Hopkins*, 7 *Wend.* 435; *Bloom v. Burdick*, 1 *Hill*, 139; *Foot v. Stevens*, 17 *Wend.* 483; *Hart v. Seixas*, 21 *Wend.* 40; *Yates v. Lansing*, 9 *Johns. R.* 437; *Wheeler v. Raymond*, 8 *Cowen*, 311, 314; *Cornelle v. Barnes*, 7 *Hill*, 35, and note (e); *The People v. Keober*, 7 *id.* 39; *Lawton v. Erwin*, 9 *Wend.* 237; *Starr v. The Trustees of Rochester*, 6 *Wend.* 566-7; *Hoose v. Sherrill*, 16 *Wend.* 33, 37, *et seq.* and cases cited; *Van Etten v. Hurst*, 6 *Hill*, 311, 314; *Sackett v. Andross*, 5 *Hill*, 327; *Bromley v. Smith*, 2 *id.* 518; *Logan v. Siggerson*, 2 *Blackf. Rep.* 266; *Evans v. Monkley*, 4 *Taunt.* 48; *Read v. Pope*, 1 *Crompt. & Mees. & Rosc.* 302; *Powell v. Ancell*, 3 *Mann. & Grang.* 171; *Caudle v. Seymour*, 1 *Adol. & Ellis*, 889, *N. S.*; *Grover v. Gould*, 20 *Wend.* 227; 1 *Saund.* 74, and note; 1 *T. R.* 151; 2 *Wilson*, 16; 1 *Salk.* 404, and note; 6 *Wheat.* 450; 3 *Dall.* 382; 4 *do.* 8; 8 *Peters*, 112.)

Seventh. In this case the return neither shows jurisdiction of the person nor subject matter.

1. Because the return shows that the judgment was rendered without waiting an hour after the return of the summons, which was necessary to acquire jurisdiction of the person. (*Vide cases cited under 2d Point.*)

2. If the return does not show affirmatively that the justice did wait the hour, the objection is equally fatal, because on a question of jurisdiction nothing can be intended in its favor. (*Vide cases cited under the 3d and 6th Points.*)

3. Jurisdiction of the subject matter is not shown, because trespass *quare clausum fregit* is a local action, and to give the

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justice jurisdiction, it must have arisen in his own county. (*Watts v. Kinney*, 6 *Hill*, 82, and cases cited; same case, 23 *Wendell*, 484; 2 *R. S.* 158, § 1.)

4. Admitting that the justice had jurisdiction of such an action arising out of his own county, yet he clearly has not, if it arose out of the state; and, therefore, to give jurisdiction of the subject matter, either the declaration or proof should have shown the trespass committed within the state of New-York. It cannot be intended that the trespass was committed in this state. (*Watts v. Kinney*, 6 *Hill*, 82, and cases cited; 1 *Chitty on Pleading*, 9th ed., 260, 267. *The justice returns all the evidence*; 21 *Wendell*, 305; 3 *Hill*, 75; 2 *Hill*, 125; 1 *Brock*. 203.)

George W. Bulkley, Attorney and Counsel for defendant in error.

First. The proceedings of the justice were regular. He did, in point of fact, wait one hour after the return of the summons before he proceeded in the cause. Such was the fact. The return, however, being silent on that point, the legal intendment is, that the justice's proceedings are all regular in this respect, until the contrary appear. If the defendant below intended to rely on this as error, he should have procured an amended and specific return on that point. In this case there is no allegation in the affidavit upon which the certiorari was allowed, or in the subsequent rule or order that the justice did not wait the hour after the return of process before he proceeded in the cause. No complaint of this kind was made to the justice who tried the cause, and who would have answered directly and truly in this respect, had he been called upon so to do. The court will not reverse unless the error be apparent and manifest on the face of the record. (*Hatch v. Mann*, 9 *Wend.* 262; *Clement v. Benjamin*, 12 *John.* 299; *Fuller v. Wilcox*, 19 *Wend.* 351; *Oakley v. Van Horne*, 21 *Wend.* 305; *Baum v. Tarpenny*, 3 *Hill*, 75.)

Second. It is contended that the declaration before the justice was bad in form and substance. And it is said, on the authority of 13 *Wend.* 85, that inasmuch as the defendant did not appear on the trial, the alleged defects in the declaration may be now

raised on writ of error, and form the ground of reversing the judgment. The declaration is in these words: "The plaintiffs appeared and declared against the defendant in an action of trespass and for breaking in and destroying and taking from the premises of plaintiffs certain boards and other fencing stuffs, and converted the same to his own use."

1. This declaration is good in substance, and its sufficiency in a justice's court cannot be questioned. Pleadings less perfect than this have for years uniformly been held good in a justice's court: unless, indeed, greater accuracy has been insisted on by demurrer in the justice's court. (3 *Caines' Rep.* 219, 152, 275, 174; *Keyser v. Shaffer*, 2 *Cowen's Rep.* 437; *Stewart v. Close*, 1 *Wend.* 438; *Fitch v. Miller*, 13 *Wend.* 67; *Chamberlain et al. v. Graves*, 2 *Hill*, 504; *Young v. Rummell*, 5 *Hill*, 60; *Cowen's Treatise*, 2 vol. 569; *Groff v. Griswold & Corning*, 1 *Denio*, 432.)

2. It is true this declaration might have been assailed on special demurrer, in the justice's court, for not stating a time and place. (*Timmerman v. Morrison*, 14 *John.* 369; *McNeil v. Scofield*, 3 *John.* 436; *Cowen's Treatise*, vol. 1, 551, 552.) But as a declaration in a justice's court, it would be good on general demurrer. (*Keyser v. Shaffer*, 2 *Cowen*, 437, and authorities above cited.) If, therefore, the declaration is good in substance as a declaration in a justice's court, the defendant cannot, on certiorari or writ of error, object to it; although he did not appear in the justice's court, he cannot now take advantage of defects, if any, in this declaration. (*Owen v. Morehouse*, 1 *John.* 276; *McNeil v. Scofield*, 3 *John.* 436; *Cowen's Treatise*, vol. 1, 552; *Groff v. Griswold & Corning*, 1 *Denio*, 432.) The declaration being good on general demurrer, and no special demurrer having been put in, the court, on certiorari and writ of error, "will give judgment in the cause as the right of the matter may appear, without regarding technical omissions, imperfections or defects, which did not affect the merits." (2 *Revised Statutes*, 257, sec. 181.) And the court will not reverse the judgment "by reason of any insufficient pleading, or the want of any allegation or averment, on account of which omission a special demurrer

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could have been maintained, for omitting any allegation or averment of any matter without proving which the jury ought not to have given such verdict." (2 *Revised Statutes*, 424, sec. 7.) The court will not, therefore, reverse the justice's judgment on account of any imperfections, if any in this declaration.

Third. The evidence was sufficient to maintain an action of trespass.

1. The legality of the proof is not questioned.

2. The sufficiency of the evidence is equally manifest. The justice who took the testimony has passed upon it and found it sufficient. And the rule of law is well settled that "if there is some evidence to support the finding of the justice, the court will not reverse the judgment." (*Fisher v. Chandler*, 1 *John.* 505; *Kellogg v. Mannycy*, 2 *John.* 378; *Wilson v. Fenner*, 3 *John.* 439; *Whiting v. Crin*, 1 *Hill*, 61.) And if the plaintiff makes out a case which *prima facie* entitles him to recover, the court will not interfere. (*Struyker v. Bergen*, 15 *Wend.* 490; *Noyes & Pettingill v. Hewitt*, 18 *Wend.* 141; *Oakley v. Van Horne*, 21 *Wend.* 305; *Baldwin v. Delevan*, 2 *Hill*, 125.)

Fourth. There was not any variance between the declaration and proof. The declaration (see *Error Book*, folio 15) may be regarded as in *trespass de bonis asportatis*, as well as in *trespass quare clausum fregit*. And the proof was (see *Error Book*, folio 16) that the defendant took boards, about fifty panels, from the plaintiff's fence, and fetched them in his own yard, and used them in making a fence around his garden temporarily, and when defendant moved away, made some other disposition of them; they were all missing about the time. But how he finally disposed of them does not appear, and is not material.

1. If we regard the declaration as in *trespass quare clausum fregit*, it is difficult to conceive how the defendant could take these boards from the plaintiffs' fence without taking them from plaintiffs' premises, and without breaking the plaintiffs' close. The word premises, in the declaration, if it is in *trespass quare clausum fregit*, means lands and tenements, and lands include many things besides the earth we tread, as waters,

grass, stones, buildings, trees and fences, and the like. Fences, therefore, are a part and parcel of the lands. A direct injury to any thing growing upon or built upon the land, or placed thereon with a view of improving it, is a direct injury to the land itself, and such an injury is called an entry into and breaking the plaintiffs' close. In contemplation of law, this close, whether substantial or imaginary, is always broken when an injury is done. (2 *Black. Com.* 18, 19; 1 *Cowen's Treatise*, 364.) It is submitted, therefore, that a direct injury done to plaintiffs' fence, or the taking boards from the plaintiffs' fence, was a breach of their close, that it was an entry or "breaking in," in contemplation of law. If this be so, then even if the declaration falls within the exception referred to by his Honor, Chief Justice BRONSON, in *Howe v. Wilson*, 1 *Denio*, 181, to wit: that the taking of the boards and other fencing stuff was a part of a trespass in which the breaking of the close was the principal thing, and that the taking was in the close; still the whole count, both the breaking and taking, are made out by the evidence; the proof corresponds with the allegation, and there is no variance in this respect.

2. It is insisted that the declaration does not come within the exception referred to in *Howe v. Wilson*, 1 *Denio*, 181. It does not allege the taking the boards, &c., to be part of a trespass in which the breaking in of the close was the principal thing; it does not allege that the defendant broke the plaintiffs' close, *and then and there* took the boards, &c., but alleges that the defendant took boards and other fencing stuff, and converted them to his own use generally, without alleging such taking to be in that close, the breaking in of which is complained of. And the plaintiffs can recover under this declaration for the taking of the goods, without proving the rest of the count, and without proof of a breaking in. The proof relates principally, if not wholly, to the taking and conversion of boards and other fencing stuff, and the recovery was only for the value of the boards and other fencing stuff so taken and converted. The judgment rendered by the said justice, therefore, may very properly be regarded as a recovery in an action

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of *trespass de bonis asportatis*, and one in which the taking of goods has no necessary connection or coupled with a breaking of plaintiffs' close. At any rate, after the boards were severed from the fence, they became the personal property of the plaintiffs below, after which there was a distinct *trespass and asportation*. If, therefore, the plaintiffs' fence was real estate, the tearing it down and taking boards therefrom was an entry and breach of their close; and if it was personal property, *trespass de bonis asportatis* will lie without showing any entry or breach; and at all events, after severance it became their personal property, for the conversion of which an action of trespass will well lie, and which in either case supported the declaration, and in either point of view is no variance from it.

Fifth. It is also insisted that the justice who tried the cause had no jurisdiction of the case, on the ground that it did not appear by the declaration or proof that the premises in which the trespass was committed were situated in the county of Columbia, where the suit was brought. This objection raises the only question entitled to any serious consideration in this case. By the common law, the action of *trespass quare clausum freget* is local. In the supreme court of this state, such action is local as relates to the place of trial, subject, however, to the power of the court, given by statute to change the venue, when it shall appear that a fair and impartial trial cannot be had where the venue is laid. (2 R. S. 409, sec. 1 and 2, old ed.) The court of common pleas (now county court) of this state have power to hear, try, and determine all local actions arising within the county where the court is held. (2 R. S. 208, sec. 1.) And the action *quare clausum fregit* being local, by common law, of course cannot be sustained in a court of common pleas, unless the property the subject of the action is situated within the county where such court is held: the jurisdiction of the court of common pleas is thus prescribed and limited by the express provision of this statute. But justices' courts of this state are not thus prescribed and limited. By the act entitled, "Of Courts held by Justices of the Peace," it is enacted that "every justice of the peace, elected in any town in this state,

has jurisdiction over and cognizance of actions of trespass and trespass on the case, for injuries to persons or to real or personal property, wherein the damages shall not exceed fifty dollars.” (2 R. S. 225, *sec.* 2.) Which jurisdiction was enlarged, as to amount, by laws of 1840, p. 265. This statute confers upon justices of the peace general jurisdiction, to hear, try and determine all actions of *trespass quare clausum fregit*, without regard to the place where the cause of action arose. The jurisdiction of the justice’s court in this respect is not limited by this statute to causes of action arising within the county where the court is held, as is that of the common pleas; but by this statute a justice of the peace has jurisdiction of an action of trespass on lands, whether the cause of action arise in his county or not. If an action of debt should be brought upon the judgment rendered by the justice in this case, it would be sustained, for the docket of the justice would show as evidence that he had jurisdiction of the person of the defendant, and of the subject matter of the suit, to wit: a trespass for an injury to real or personal property. (*Benn v. Borst*, 5 *Wend.* 592.) It never was held or settled in this state that an action of trespass on lands could be sustained only before a justice of the county in which the land lies. On the contrary, the late Justice COWEN, while remarking upon the jurisdiction of justices of the peace, in his Treatise, (1 *Cowen’s Treatise*, 27 and 28,) held that a justice has jurisdiction of the action of trespass for a direct injury to real or personal property, and that whether the cause of action arise in his county or not, and that it was doubtful whether the doctrine of local jurisdiction was applicable to a justice’s court. And the defendants in error beg leave to refer to the following cases in a neighboring state, where the same principle is sustained, under a statute similar to our own. “An action for injury to real estate, if the damage does not exceed \$20, is not local to the county where the land lies, but may be brought before a justice in any county where the defendant may be, and on plea of title may be carried to the court of common pleas for such county.” (*Sumner v. Finnegan*, 15 *Mass. Rep.* 280; *Pitman v. Fluit*, 10 *Pick.* 504; *Morton v. Chase*, 15

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Maine Rep. 188.) One reason, and perhaps the only one, why the action of *trespass quare clausum fregit* is local in the supreme court and in the common pleas, is, that in those courts the title to the lands may be examined and settled, and it is more convenient for the parties to try the cause in the county where the conveyances and evidences of title remain; but in the case of justices' courts this reason does not exist, for that court cannot inquire into title to lands, and consequently cannot receive any documentary or other evidence of title. And so in the case of an action against public officers, which is made local to the county where they reside, for their own convenience, and to prevent them from being harassed by suits at a distance. If they remove into another county, and the amount is so small that they can be sued for it only in a justice's court, and the reason of the provision of the statute having there ceased to exist, the suit may be brought in the county where they reside. (13 W. 365.)

Sixth. There is nothing in the return of the justice to show that the cause of action in this case arose out of the county in which the justice resided. From reading the return, no one would imagine the trespass was committed out of the county of Columbia; and yet the court are asked to intend the cause of action arose out of the county of Columbia, (which is not the truth,) and even out of the state of New-York, for the purpose of reversing this judgment. It is submitted that the court ought not so to do; but will hold that the said justice having had jurisdiction of the parties and generally of the subject matter of the suit, all intendments must be in favor of affirmance, rather than the reversal of the judgment. (*Fuller v. Wilcox*, 19 W. 351; *Oakley v. Van Horne*, 21 W. 305; *Cowen's Treatise*, 1096.)

DECISION.—Judgment affirmed, unanimously, on the ground that the action is trespass *de bonis*.

NOTE.—It is not necessary that a *return* of a justice of the peace to a certiorari should show that he waited *one hour* after the time for the return of the process, (2 R. S., 234, § 46,) before he entered judgment. The court will intend that the justice waited the requisite time.

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It is a settled principle, that before a judgment can be reversed it must appear *affirmatively* that the justice has *erred*.

A declaration in a justice's court may be so general and informal as to be bad on *special demurrer*, but good on *general demurrer*. And in such case the common pleas on certiorari (2 R. S. 257, § 181) is authorized to disregard technical omissions, imperfections or defects, not affecting the merits, and give judgment as the right of the matter may appear. (*See also* 2 R. S. 424, § 7, *providing for amendment of pleadings, &c.*)

Where the declaration was for trespass and for *breaking in* and destroying and taking from the plaintiffs' premises certain boards, &c.; and the proof was that the defendant *took boards*, about fifty panels, *from plaintiffs' fence, &c.*,—*held*, that the evidence was sufficient to authorize a court or jury, at least, to infer a *breaking in* the premises, from which the boards were taken.

It is not necessary that it should appear *affirmatively*, that the *premises*, on which a trespass alleged to have been committed, were situated in the *county where the justice of the peace resides*. The legislature has conferred jurisdiction upon justices of the peace (2 R. S. 225, § 2; *Laws*, 1840, *ch.* 317, § 2) of the action of trespass on lands, whether the cause of action arise in the county where the justice resides or not.

Although courts of common pleas had not *original* jurisdiction in such actions of trespass, &c., (arising out of the county,) yet they had jurisdiction on certiorari or on appeal from justices' courts in such cases.

Where it appears that a justice of the peace, in an action of trespass on lands, has jurisdiction of the parties and generally of the subject matter, an appellate court will not intend that the trespass was committed on lands situated *out of the state*.

Not reported in this court.

CHARLES, impleaded, &c., plaintiff in error, *agt.* THE PEOPLE, defendants in error.

Questions discussed.

1. Whether advertising in this state a lottery and the sale of lottery tickets, to be drawn in another state, and authorized in the latter state, are within the prohibitions of our constitution and statute, (1 R. S. 665,) which forbids the formation of any lottery within this state?

2. Whether it is necessary to aver, expressly, in an indictment that the lottery is *not authorized by law*?

3. Whether an indictment is defective in not averring for what purpose the lottery in question is set on foot, where it sets forth in *extenso* the advertisement, by which it is apparent that the prizes consist of money?

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The indictment in this case was as follows:—

“City and County of New-York, *ss.*—The jurors of the people of the state of New-York, in and for the body of the city and county of New-York, upon their oath, present—that Charles McIntyre, late of the first ward of the city of New-York, in the county of New-York aforesaid, laborer, and Edmund Charles, late of the same place, also laborer, on the sixth day of January, in the year of our Lord one thousand eight hundred and forty-six, at the ward, city and county aforesaid, with force and arms, did in a certain newspaper, called the Wall Street Reporter, print and publish an account of a certain illegal lottery, stating when the same was to be drawn, and where tickets were to be had, with the prizes, which said account, so printed and published by the said Charles McIntyre and Edmund Charles, is as follows:

“That is to say, \$50,000, \$15,000, \$6,000; ten prizes of \$2,000 each, and ten prizes of \$1,000, Union Lottery, Class 3, 1846, decided by the numbers drawn from the wheel of the Alexandria Lottery, Class 3, to be drawn at Alexandria, (D. C.,) Jan. 17, 1846. 78 numbers, 14 drawn ballots. Grand scheme—

1	prize of	\$50,000	is	\$50,000
1	“	“	15,000	“ 15,000
1	“	“	6,000	“ 6,000
1	“	“	2,410	“ 2,410
10	prizes of	2,000	are	20,000
10	“	“	1,500	“ 15,000
10	“	“	1,200	“ 12,000
10	“	“	1,000	“ 10,000
10	“	“	500	“ 5,000
10	“	“	300	“ 3,000
300	“	“	150	“ 45,000
64	“	“	100	“ 6,400
64	“	“	80	“ 5,120
64	“	“	60	“ 3,840
64	“	“	40	“ 2,560
64	“	“	30	“ 1,920
5,504	“	“	20	“ 110,080
28,224	“	“	10	“ 282,240

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34,412 prizes, amounting to \$595,570. Whole tickets, \$10; halves, \$5. To determine the fate of these prizes and blanks, 78 numbers, from 1 to 78 inclusive, will be severally placed in a wheel on the day of the drawing, and 14 of them will be drawn out at random: and that ticket having on it as a combination, the 1st, 2nd and 3rd drawn numbers, will be entitled to the capital prize of \$50,000. That ticket having on it the 7th, 8th and 9th drawn numbers, to \$5,000. The ticket having on it the 10th, 11th and 12th drawn numbers, to \$2,410. Those ten tickets having on them the 12th, 13th and 14th; 2nd, 3rd and 4th; 3rd, 4th, 5th; 5th, 6th, 7th; 6th, 7th, 8th; 8th, 9th, 10th; 9th, 10th, 11th; 11th, 12th, 13th; 1st, 2nd, 4th; 1st, 2nd, 5th, each \$2,000. Those tickets having on them the 1st, 2nd, 6th; 1st, 2nd, 7th; 1st, 2nd, 8th; 1st, 2nd, 9th; 1st, 2nd, 10th; 1st, 2nd, 11th; 1st, 2nd, 12th; 1st, 2nd, 13th; 1st, 2nd, 14th; 1st, 3rd, 4th, each \$1,500. Those ten tickets having on them the 1st, 3rd, 5th; 1st, 3rd, 6th; 1st, 3rd, 7th; 1st, 3rd, 8th; 1st, 3rd, 9th; 1st, 3rd, 10th; 1st, 3rd, 11th; 1st, 3rd, 12th; 1st, 3rd, 13th; 1st, 3rd, 14th, each \$1,200. Those ten tickets having on them the 1st, 4th, 5th; 1st, 4th, 6th; 1st, 4th, 7th; 1st, 4th, 8th; 1st, 4th, 9th; 1st, 4th, 10th; 1st, 4th, 11th; 1st, 4th, 12th; 1st, 4th, 13th; 1st, 4th, 14th; each \$1,000. Those ten tickets having on them the 1st, 5th, 6th; 1st, 5th, 7th; 1st, 5th, 8th; 1st, 5th, 9th; 1st, 5th, 10th; 1st, 5th, 11th; 1st, 5th, 12th; 1st, 5th, 13th; 1st, 5th, 14th; 1st, 6th, 7th, each \$500. Those ten tickets having on them the 1st, 6th, 8th; 1st, 6th, 9th; 1st, 6th, 10th; 1st, 6th, 11th; 1st, 6th, 12th; 1st, 6th, 13th; 1st, 6th, 14th; 1st, 7th, 8th; 1st, 7th, 9th; 1st, 7th, 10th, each \$300. All others with three of the drawn numbers on, (being three hundred,) each \$150. Those sixty-four tickets having on them the 1st and 2nd drawn numbers, each \$100. Those sixty-four tickets having on them the 3rd and 4th drawn numbers, each \$80. Those sixty-four tickets having on them the 5th and 6th drawn numbers, each \$60. Those sixty-four tickets having on them the 7th and 8th drawn numbers, each \$40. Those sixty-four tickets having on them the 9th and 10th drawn numbers, each \$30. All others

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(being 5,504) with any two of the drawn numbers, each \$20. All others (being 28,224) with one only of the drawn numbers, each \$10. Certificates of 26 wholes will be sent for \$110; do. 26 halves, \$55; do. 26 quarters, \$28; do. 26 eighths, \$14. Address all orders to Charles McIntyre & Co., 35 Wall-street, New-York. Against the form of the statute in such cases made and provided, and against the peace of the people of the state of New-York, and their dignity."

To this indictment Edmund Charles put in a general demurrer. The court of general sessions rendered judgment against the defendant, Charles, on the demurrer, who brought a writ of error and removed the judgment to the supreme court, where the judgment was affirmed, and the following opinion delivered:

By the court. BRONSON, Justice. This case cannot be distinguished from that which has been referred to. Since the expiration of the laws authorizing lotteries, they are "unlawful and common public nuisances," so far as there may be attempts to carry them on in this state. (1 R. S. 665, § 26.) Conceding, therefore, that this lottery was to have been drawn in the district of Columbia, and that it may have been authorized by the laws by which that district is governed, its tickets cannot legally be sold or advertised for sale in this state. There is a formal defect in this indictment, in the omission to allege that the lottery was one "for the purpose of exposing, setting to sale, or disposing of," property or money according to the description contained in the seventy-seventh section.

But the publication is set forth, and from that it appears that the prizes consisted in sums of money. Upon the ground, therefore, that argumentative pleading in an indictment will not vitiate, (which was settled in *The People v. Rynders*, 12 *Wend.* 424,) the judgment of the court below was correct.

Judgment affirmed."

Charles brought a writ of error and removed the judgment to this court.

*Charles C. Egan & John M. Platt, Attorneys, and
Charles C. Egan, Counsel, for plaintiff in error.*

First. The facts charged in the indictment do not constitute any offence against the laws of the state of New-York,

Second. The Revised Statutes, 2nd edition, p. 669, part I, chap. 20, art. 4, sec. 27, forbids the opening, setting on foot, drawing, &c., of any lottery "*within this state,*" &c.

The 28th section prohibits the publication of notice of "*any such lottery.*"

The lottery in this case is to be drawn in the district of Columbia, and the prohibition against publishing does not apply.

The 36th section forbids giving notice of "*insurance*" of tickets, &c.

There is no other section that relates to the giving of notice.

Third. In the case of *The People v. Sturtevant*, in 23rd *Wendell*, the defendant was charged with "*selling*" tickets—not with "*giving notice.*"

Is not authority in this court.

Fourth. The indictment is defective in not averring for what purpose the lottery in question was set on foot, &c.

The statute requires that the lottery shall be "for the purpose of exposing, setting to sale, or disposing of, any houses, lands, tenements, or real estate, or any money, goods, or things in action."

3 *Denio*, 88, 101; 7 *J. R.* 434, lottery case; 5 *J. R.* 327; 2 *W. Blackstone*, 1093, insurance of lottery tickets not criminal; 7 *T. R.* 535. Answer—Are no special insurances in criminal cases. 9 *Cow.* 578.

John McKeon, District Attorney and Counsel for defendants in error.

First. The 27th, 28th and 29th sections of the statute apply to this indictment. (1 *Revised Statutes*, 2nd ed., p. 669.)

Second. All lotteries are forbidden by our constitution, and are nuisances and illegal by statute. Grand juries are to be charged in relation to them. (1 *Revised Statutes*, 669, sec. 26; 671, sec. 41.)

Third. Advertising a lottery and the sale of lottery tickets

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are within the 27th section of the revised statutes, which forbids the *formation* of any lottery within this state. The section does *not* declare that the lottery shall be *drawn within this state*. The language of the statute is, that no person within this state shall open, set on foot, carry on, *promote* or draw, &c. (1 *Revised Statutes*, 669, *sec.* 29.)

Fourth. It does not appear on the face of the indictment that the lottery was to be drawn in *Alexandria*, in the district of Columbia. On the contrary, the advertisement set forth in the indictment was for the sale of tickets in the *Union Lottery*, to be decided by the drawing of the *Alexandria Lottery*. (*Page 5 of Record*.)

Fifth. Previous to the constitution of 1821 it was settled that a lottery instituted by the laws of another state is within the act to prevent private lotteries. (*Hunt v. Knickerbocker*, 5 *Johnson R.* 327.)

Insurance of tickets in a lottery, established by law of this state, having been declared illegal, the insurance of tickets in a foreign lottery was held illegal; such insurance being contrary to the policy indicated by the former act. (*Mount & Wardell v. Waite*, 7 *Johnson R.* 434.)

Sixth. From reasons in the cases referred to, it is clear that the provisions of the revised statutes under which the indictment has been framed, extend to all cases, whether the lottery advertised is authorized by the laws of this state or not. The offence is clearly against the policy of the law.

Seventh. The case of *The People v. Sturtevant* clearly sustains this indictment; all lotteries being now illegal, it is unnecessary to aver that the lottery was not *expressly authorized by law*. (*People v. Sturtevant*, 23 *Wend.* 418; 3 *Denio*, 95; 5 *Pick.* 41, 42; 6 *N. H.* 53.)

Eighth. The indictment sets forth *in extenso* the advertisement, and from the indictment it is apparent that the prizes consisted of sums of money. Argumentative pleading will not vitiate. (*People v. Rynders*, 12 *Wendell*, 425; 5 *Hill's Rep.* 249; 2 *R. S.* 609; *Barbour*, 279; 5 *Wend.* 271.)

DECISION.—Judgment affirmed, unanimously.

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NOTE.—*Held*, that the words “such illegal lottery” in the 28th section of the statute (1 R. S. 665) relate not solely to the particular kind described in the 27th section, but to *all lotteries*; as all are by the 26th section declared to be “unlawful and common and public nuisances.” (See *People v. Sturtevant*, 23 *Wend.* 418.)

Consequently, in an indictment for such an offence, drawn under § 28, a general averment of publication is sufficient.

But it was not necessary to directly and expressly allege in the indictment that the lottery, of which the defendant published an account, was opened or set on foot for the purpose of disposing of money or other property, as that fact appeared from the advertisement set out in the indictment; and according to the decision in *The People v. Rynders* (12 *Wend.* 425) was good pleading in criminal cases.

Reported, 1 *Comstock*, 180.

ADAMS, plaintiff in error, *agt.* THE PEOPLE, defendants in error.

Questions discussed.

1. Whether a citizen, who was and always had been a resident of another state, was liable criminally for acts committed (obtaining money by false pretences) in and against the laws of this state, by his procurement, through innocent agents here?

The indictment in this case was found against Samuel Adams and Richard R. Seymour, for obtaining money of Suydam, Sage & Co., of the city of New-York, commission merchants, under false and fraudulent pretences. The first five counts of the indictment were framed upon the following receipt, and five drafts and acceptances given under it, amounting to \$28,160:—

“Received from Samuel Adams eighteen hundred and sixty barrels mess pork, two thousand six hundred barrels prime pork, six hundred and sixty barrels lard, (large size,)

Marked marked as per margin, in good order and condition, for and irrevocably subject to the order of Suydam, Sage & Co.; and I agree to forward

and deliver the same with all reasonable diligence, as soon as navigation will permit, to the said Suydam, Sage & Co., in the

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city of New-York, in the like good order and conditioned, (damages by fire and navigation excepted,) they paying for all charges and freight upon delivery thereof as is customary. Suydam, Sage & Co. hold the said property for sale on commission, and have a lien thereon not only for the subjoined draft against this property for \$28,160, but also a general lien thereon for all other liabilities incurred or to be incurred by them for the said consignors.

“Dated, Chillicothe, 11th of January 1844.

“R. R. SEYMOUR.”

The first draft and acceptance was as follows:—

“Chillicothe, Ohio.	January 8th, 1844.
No. 124.	\$4,160.

“Six months after date, pay to the order of Samuel Adams four thousand one hundred and sixty dollars, value received, which place to acc’t of

“To Suydam, Sage & Co., New-York. SAMUEL ADAMS.
(Endorsed) Samuel Adams. (Accepted) Suydam, Sage & Co.”

The second draft was in all respects like the first, except that it was dated Jan. 9, 1844, for \$6,000. The third was like the second, except the date, which was Jan. 10, 1844. The fourth was the same, except it was dated Jan. 11, 1844. And the fifth was the same, except the date, which was Jan. 12, 1844.

The sixth and seventh counts were upon a like receipt, signed by R. R. Seymour, for 1,300 barrels of mess pork, and 1,100 barrels prime pork—and three like drafts and acceptances given under it, amounting to \$12,200.

The trial came on before the court of general sessions of the peace, in and for the city and county of New-York, on the 15th day of April, 1846. Hon. JOHN B. SCOTT, Recorder, and JOSEPH A. DIVVER and DAVID S. JACKSON, Aldermen. After the public prosecutor had rested, the prisoner moved for a dismissal on the grounds now appearing in the plea. The court refused thus to arrest the cause, but announced that the majority were of opinion that the tribunals of this state had no jurisdiction over the offender, and that they would so instruct the jury, the

sole judges of the law and fact. The public prosecutor, to secure the privilege of a writ of error, and the counsel for the prisoner, thereupon came to an agreement that the plea now on record be substituted. This plea is as follows:—

“And the said Samuel Adams, impleaded with Richard R. Seymour, defendant in this suit, in his own proper person comes here into court, protesting that he is not guilty of the offences alleged in the said indictment; nevertheless, for plea thereto, he says that he, the said defendant, was born in Ross county, in the state of Ohio, of parents then residing in and being citizens of the state of Ohio, and from the time of his birth until the time of the exhibiting of this plea, and for and during all the intermediate times, he was and has been, and still is a resident of and in the state of Ohio: that at the said several times when the supposed offences set forth in the several counts in the said indictment were as therein alleged committed, he was not, nor was he at any time prior thereto, in the said city, county, or state of New-York, nor within the territorial limits of the said state of New-York: that the said several writings called receipts and drafts, set forth in the said indictment, were all drawn, signed, and made in the said county of Ross, and while he, the said Samuel, was resident therein; and the said several receipts and drafts were by the said Samuel Adams presented in the city of New-York to the said persons so using the name, style and firm of Suydam, Sage & Co., through the instrumentality of innocent agents employed by the said Samuel Adams, while he, the said Samuel Adams, was and continued to be such resident of and personally within the said county of Ross, in the state of Ohio, aforesaid, and were in the said city of New-York presented to the said persons so using the name and firm of Suydam, Sage & Co., by the said Samuel Adams, through such innocent agents, and the said persons so using the name, style, and firm of Suydam, Sage & Co., then and there relying upon the truth of the same, were deceived and defrauded thereby. And the said several supposed offences in the said several counts of the said indictment

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set forth, were committed by him, the said Samuel Adams, in the said city and county of New-York, by his causing and procuring the same to be done therein, as aforesaid, while he, the said Samuel Adams, was in the said county of Ross, in the state of Ohio aforesaid; wherefore he, the said Samuel Adams, ought not to be criminally questioned or proceeded against in the state of New-York, for the said acts and offences so done by him, and caused and procured to be done by him, as aforesaid, while he was so resident and being in the said county of Ross; and this the said Samuel Adams is ready to verify, &c.; therefore he prays judgment, &c.”

To this plea there was a general demurrer put in by the public prosecutor, and joinder in demurrer by the defendant.

The supreme court on writ of error, July term, 1846, reversed the judgment of the general sessions, and found the indictment good—BEARDSLEY, Justice, delivering the opinion of the court. (*Reported 3 Denio*, 190.) Adams, the defendant, brought a writ of error, and removed the proceedings to this court.

*J. H. Raymond, Attorney and Counsel, and
George Wood, Counsel, for plaintiff in error.*

First. All objections to the form of the plea are waived, and it is intended to present under it the single question of the liability of a citizen of the state of Ohio to be presented for acts committed by his procurement against the laws of this state, while he was resident and being in such other state. The defendant is not precluded from contesting the facts charged in the indictment, if the decision of the court on the legal question presented by the demurrer should be found against him.

Second. The act alleged in the indictment to have been committed by S. Adams, and which is charged as a crime against the people of New-York in their sovereign capacity, was committed by him, as alleged, while he was in the state of Ohio, and out of the state and jurisdiction of the government of New-York.

Third. The said S. Adams, at the time he so committed said

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act, resided in, and owed permanent allegiance to the state of Ohio; and at all times previous thereto, from and after the day of his birth, owed such allegiance to the government of Ohio; he having been born in the last-mentioned state, and having at all times previous to said act, from the day of his birth, resided in the said state of Ohio.

Fourth. The said S. Adams, at the time he so committed said act, owed no allegiance, either permanent or temporary, to the government of the state of New-York, and never had at any time previous thereto owed any such allegiance to said government of New-York. Because,

1. This being a proceeding against the person of the defendant, the government of New-York must have jurisdiction over his person.

2. Personal rights, by public international law, as well as by the codes of all modern civilized nations, are regarded as more important than the rights of property.

3. Not being a permanent citizen of New-York, there must be an actual residence, or presence in its territory, to create a temporary personal allegiance. Such allegiance cannot be created by construction or by fiction.

Fifth. Allegiance, or the obligation to obey the government of a country, is essential to subject a person to punishment for the violation of its public laws against crime, except in the case of piracy or other offences which are a violation of the public law of nations. (*The King v. Despardo*, 1st Taunton, 26.)

Sixth. Such allegiance is essential for the purpose aforesaid, whether the act done be a direct infringement of allegiance, or of a law which derives its sanction only from such allegiance, in which alone consists the obligation of the party to obey it.

Seventh. The said Samuel Adams, not owing any allegiance of any kind to the government of New-York, and being under no obligation of political or legal obedience to said government, at the time he so committed said act, was not, and is not, legally guilty by reason thereof, of any crime against the government of New-York, and was not, and is not, subject to any penalty which, by the laws of New-York, might be inflicted upon any

person or persons for the doing of acts, owing at any time allegiance and political obedience, and subject to the jurisdiction of the last mentioned state. (*The State v. Knight*, *Taylor's North Carolina Reports*, 65. *Ex parte Smith*, *Law Reporter*, vol. vi, p. 57.)

☞ Nothing done in North Carolina—all in Virginia. ☞

Eighth. If any crime against the state of Ohio was committed by the said Samuel Adams, for having originated, and in fact committed the said act in the state of Ohio, though afterward consummated in New-York, he being as well at the origination as at the consummation thereof, and during the intermediate season resident in and owing allegiance to the said state of Ohio, he is not liable to be presented criminally therefor in the state of New-York, and by and under the laws of the last mentioned state. (*Folkiott v. Ogden*, 1st H. Blackstone, 123; *Mostyn v. Fabingas*, Cowp. 161; *The King v. Alsop*, 1st, 33.)

Ninth. If the subject of a foreign state causes any injury to be done in another state, while he is in the territory of the former, his nation is responsible for the injury.

Tenth. An extra-territorial responsibility by an individual in his person to laws to which he owed no subjection, and to which he is a stranger, would be fraught with the most pernicious consequences to the personal rights of men.

Eleventh. There is nothing in the constitution, or laws, of the government of the United States which renders the said Samuel Adams responsible to the government of New-York, or punishable by its laws and judicial tribunals for the commission of the said act, while he was in the state of Ohio, as aforesaid.

And said act was not committed by him in violation of his duty to the government and laws of the United States.


☞ (Raymond.) Must show that defendant was bound to support our laws.


Great question of allegiance not very fully met by supreme court.

Right to maintain personal actions is transitory, but not so of crimes.

Bound to obey laws, because he is a party to them—has an agency in making them.

Are several cases much in point which were not noticed by Judge BEARDSLEY, though some of them were cited there. (1 *Taunton*, 26. Indict. for murder in China.)

Cannot reach the offender—is not a fugitive from justice. 

 (G. Wood, in reply.)—Man in New-Jersey with a gun kills one in this state, can be no punishment here. So if write a letter here influencing slaves in South Carolina, no punishment there.

2. Same doctrine between states of this union, must be allegiance, and cannot apply doctrine of fictions. Sovereignty of states—early opinions. (2 *Peters*, 586.) States foreign to each other, except as bound by Const. U. S.

Amendment Const. U. S. was intended to break down the contrary doctrine. (4 *Wash. C. C.* 371.)

Not a consolidated, but a confederated government.

The whole here is a question of state law. (3 *McLean*, 132–3.)

If guilty by fiction, then by fiction he fled from justice—may demand him as a fugitive as well as hold him guilty.

Allegiance—rule prescribed by a superior to an inferior, &c. Commanding implies a power to enforce.

Obedience lies at the foundation of all law; without it there is no law. Law is nugatory as to every man who does not owe obedience. (7 *Co. Calvin's case*; *Tomlin's L. D. Allegiance*.)

Is a wide difference between penal and other laws.

In civil suit here it is not necessary that any law of this state should have been violated.

But *crimes* otherwise. (*Story, Conf. of Laws*, ch. 16; also p. 32–3; 11 *Wheat.* 123; 7 *Cr.* 116; 3 *Story, Const.* 53; *Piracy*, 4 *Bl.* 71–73; 3 *Inst.* 112.)

Argument on the other side comes to this—may convict and punish here a man who owed no obedience to our laws. (*Story, Conf.* § 19, 20, 80.)

I admit was a violation of the law of this state. Series of acts beginning in Ohio, terminating in New-York. Act com-

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mitted when series terminated. Local allegiance do n't depend on municipal law, but great law of nations.—*Fictitious presence*.—Question under municipal law about place of trial. No such thing in law of nations.

No case where Frenchman or Russian has been punished in England for act done in his own country. No demand to deliver up. (*Bacon Ab. Alien C.* 2; 3 *J. Ch. R.* 587; 10 *East.* 536.)

Where individual does an injury to another nation while at home, remedy is against *nation* of offender.

I admit that if a Frenchman send inflammatory papers into England, and cause them to be circulated there, will be a violation of English law; but cannot be punished criminally there, unless owe allegiance there.

In fiction of law he is personally present, but no fictitious or constructive presence where no allegiance.

These states sovereign and independent—same as England and France, except as modified by the U. S. constitution. (7 *Co.* 13.)

I admit the crime was committed here, and nowhere else. I admit also, according to the common law doctrine, that though the defendant was not here, he is deemed to have been personally present. 🖱

*John McKeon, District Attorney and Counsel, and
Ogden Hoffman, Counsel for defendants in error.*

First. The crime for which the defendant stands indicted was committed at the place where it was consummated, and the money obtained.

1. The fraudulent pretence did its mischief, and the money was obtained within the city and county of New-York.

2. Supposing New-York and Ohio to be different counties of the same state or jurisdiction, the venue, it will not be denied, is in New-York. (*Rex v. Batterby, B. & Ald.* 179; *Rex v. Coombs.* 1 *Leach Crown L.* 432, 388; *Esser's Case,* 1 *East P. C.* 125, 369; *Stark.* 5 *Crim. P.*, 25, 164; *U. S. v. Davis,* 2 *Sumner,* 485; *Foster's Crown Law,* 349; 1 *Hale, P. C.* 616; *Doag-*

lass, 235; 2 *T. R.* 238; 2 *B. & P.* 381; 21 *Wend.* 537; 1 *Chit. Cr. Law.* 190; 3 *B. & P.* 596.)

Second. The question of venue is not one of convenience, but of substance, viz., at what place was the crime committed? In determining venue the court determines jurisdiction. Venue establishes at what place the criminal was guilty, and as a consequence thereof, at what place he shall be tried, without reference to allegiance or to the place where the criminal actually was at the time the crime was committed. The broad principle being "*crimen trahit personam.*" (5 *D. & R.* 616; 3 *B. & C.* 706—cited with approbation. *Rex v. Batterby*, 4 *B. & A.* 179; *Chit. Crim. Law*, *et sup.*)

The offence for which the prisoner is indicted is a felony, and the venue is absolute, single, and exclusive. (*Andrew v. Dieterich*, 14 *Wend.* 36; *English Cases*, cited in *Harrison's Digest*, title "*Crim. Law*," sub. "*False Pretences*;" *Chit. Crim. Law*, title, "*Venue*.")

Third. When a crime is procured to be done by an *innocent agent*, the procurer is the principal and the *sole offender*, and in judgment of the law personally present at the time and place of the committing of the offence. *Qui facit per alium facit per se* is applicable as well to crime as to contracts, and constructive presence is a doctrine well known in criminal law. (*Rex v. Munton*, 1 *Esp.* 62; *Barkhamsted v. Parsons*, 3 *Conn.* 1; *Rathbun's Case*, 21 *Wend.* 509; *King v. Brissac*, 4 *East.* 164; *Hill's Case*, 11 *Mass.* 136; *Rex v. Michaels*, 9 *Car. & P.* 356; *Rex v. Lewis*, 6 *Car. & P.* 161; 1 *Chit. Crim. Law*, 191, and cases cited.)

Fourth. No different or additional question arises, although the offender may be the citizen of a foreign state. The doctrine of constructive presence knows of no such exception. The principle, "*crimen trahit personam*," applies whether the offender be out of the state or out of the county. "He will not be allowed," in the language of Judge COWEN, "to gainsay the fact that he was present." (*Rathbun's Case*, 21 *Wend.* 509; *Barkhamsted v. Parsons*, 3 *Conn.* 1; *Harvey's Case*, 8 *Am. Jurist*, 69; *Gillespie's Case*, 7 *Serg. & Rawle*,

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478; *McLeod's Case*, 1 *Hill*, 406-7; 3 *McLean. R.* 120; *Rawle Const.* 100.)

Fifth. Allegiance is the duty which a subject owes his lord or government. The duty of allegiance is not essential to create amenability to criminal law, nor need it be shown except in cases in which the breach of allegiance is the essence of or an ingredient in the offence. And the averments in such indictments vary essentially from indictments on common law felonies. (5 *St. Trial*, 462, *Howell*; *Foster's Crown Law*, 188, discourse upon high treason; *Rex v. Johnson*, 6 *East*. 590; *S. C.* 7 *East.*; *McLeod's Case*, 1 *Hill*; *Gillespie's Case*, 7 *Serg. & Rawle*, 478; *Harvey's Case*, 8 *Am. Jurist*, 69; *Fisher's Case*, 1 *Stuart, Canada R.* 245; *Nune v. Keye*, 4 *Taunt.* 34.)

Sixth. The rule that "Criminal laws shall not have extra territorial effect," does not mean that such laws shall not affect foreigners owing no allegiance natural or temporary, who have committed crimes within and against this state. But simply that courts will not execute within their own jurisdiction the criminal laws of a foreign jurisdiction. So all the cases will be found. (Such was *Scoville v. Canfield*, 14, *J. R.* 338; *Common. v. Green*, 17 *Mass.* 515.)

Seventh. Ignorance, on the part of the defendant, of the laws of our state, will not be implied, and would be no defence. (*Rex v. Esop, Car. & P.* 456.)

Besides, the *stat.* 33 *Hen.* 8, *ch.* 1, was a part of the common law of the land, brought here at the time of the emigration of our ancestors. (1 *Kent Com.* 472, *notes a and b*, *ed.* 1840; *Carwood v. State of Alabama*, 1 *Stev. & Port.* 327, and cases cited.)

This particular statute has been declared to be part of the common law of Massachusetts. (*Com. v. Hanen*, 6 *Mass.* 72.)



However modified by statute, it is part of the common law Cheat—a *crimen falsi*—known to every man's conscience to be an immoral and criminal act—for which all courts will hold a man amenable when found at any time, or in any way, within their jurisdiction.


Eighth. We have hitherto considered the case as if Ohio

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and New-York bore no other relation to each other than England and France. But the federal constitution makes the citizens of each state entitled to all privileges and immunities of citizens in the several states. (*U. S. Const., art. 4, sec. 2.*)

It is not necessary for the court to consider the duty of the executive in such cases, or whether he would be bound to deliver up as a fugitive. The court now finds the prisoner within its jurisdiction.

 (McKeon.)—Allegiance only in question when the charge is treason. Pirates taken on the high seas are punished, though they owe no allegiance. Protection to society is the object of the criminal law. 

 (Ogden Hoffman, same side.)—Where the crime is committed there the criminal is answerable. It is said cases cited were upon the mere question of venue. In criminal cases venue is matter of substance. Admitted a man may be in a county where he never was, if the crime was there. Another *state* does not alter the principle.


Allegiance is a different thing from a duty to obey the laws and liability to punishment.

If any allegiance here as exists elsewhere, it would be to the government of the U. S.

No case holds that allegiance is necessary to jurisdiction. (1 *Esp.* 62; 6 *East*, 602; 7 *East*, 65, *S. C.*) In 6 *East*, attorney general cites a case in point on *hab. corp.* (21 *W.*; 2 *Sumner*, 485.)

Allegiance nothing to do with the question, when crime is against statute or common law. Only comes in in treason or when it gives greater enormity to crime.

Allegiance may give jurisdiction over crimes committed abroad, but want of it cannot deprive of jurisdiction where the offence was committed. (1 *Taunt.* 25; 7 *Cranch*, 139; 25 *Wend.* 601; 3 *Conn.* 5.)

Court of the United States gives the defendant all the privileges of a citizen of this state. Here the offence is *malum in se*. Defendant knew he was violating laws of God and man. 

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DECISION.—Judgment affirmed unanimously.

NOTE.—GARDINER, J., delivered the opinion of the court, in which BRONSON, J., concurred, by stating the conclusions at which he arrived.

Held, that the defendant may be rightfully punished. He had violated a law to which he owed obedience, for it was written upon his own conscience, and obligatory everywhere. To that law the statute of this state has affixed a penalty, to be enforced in her own tribunals for the protection of her own citizens.

The immunity he enjoyed at home from arrest and punishment was not due to him as a criminal, or as a citizen of Ohio, but because he had injured no one whom that state was bound to protect, and because the inviolability of its territory was an essential to its sovereignty and independence. The prisoner knew that, through his agent, he was defrauding those who were entitled to the protection of our laws, and he cannot be permitted to say that he did not know that it was unlawful to cheat in New-York as well as in Ohio. (*Per* GARDINER, J.)

Also *held*, that it was not a matter of any importance whether the defendant owed allegiance to this state or not. But two cases where the question of allegiance can have anything to do with a criminal prosecution: 1st, Treason; 2d, Where the government proposes to punish offences committed by its own citizens beyond the territorial limits of the state. When the offence, not being treason, is committed within this state, the question of allegiance nothing to do with the matter.

Jurisdiction of the offence, or subject matter, and jurisdiction to try the offender, are very different things. The first exists whenever the offence was committed within this state; and the second, when the offender is brought into court, and not before. And this is so whether he be a citizen or not. (*Per* BRONSON, J.)

Reported 1 Comstock, 173.

CODDINGTON, plaintiff in error, *agt.* DAVIS AND OTHERS, defendants in error.

Questions discussed.

1. Whether the word "protest" has been adopted in legal and mercantile language, as comprehending *demand and notice*, when applied to a promissory note?

2. Whether the following letter from the *endorser* to the *holders* of a promissory note was a waiver of demand of the maker, and notice of non-payment to the endorser?

Coddington *agt.* Davis and others.

“Messrs. Davis Brooks & Co. Gent.,—Please not protest T. B. Coddington’s note due 2nd February for ten thousand dollars, and I will waive the necessity of the protest thereof. And oblige respectfully, &c.

“New-York, January 28, 1840.

SAML. CODDINGTON.”

3. Whether an *assignment* by the maker of the note, to one of the holders, (immediately prior to the maturity of the note,) of all his property for the benefit of his creditors, giving preference to the *endorser* for the amount of the note in question, exonerated the holders from demanding payment, and giving notice of non-payment?

4. Whether a release and full discharge of all claims and demands signed by the holders of the note and other creditors to the *maker*, except what should be realized of said claims, &c., from the *assignment* made by the maker to one of the holders of the note, was such a discharge to the maker of the note as released the endorser?

5. Whether a new agreement executed by the maker, in consideration of the aforesaid release executed by the holders of the note and other creditors, to pay the creditors at the expiration of seven years whatever balance of said claims should remain unpaid out of the assets of said assignment, operated as a valid extension to the maker of the time of payment of such balance by which the endorser upon the note in question was discharged?

6. Whether, if the holders could not maintain an action against the maker on the note, until all the assigned property had been applied, and the balance remaining due thereby ascertained, their remedy against the endorser was not *suspended*?

This was an action of assumpsit commenced in the superior court of the city of New-York, by Charles A Davis, Sidney Brooks, Charles Davis and Theodore Dehon, plaintiffs, against Samuel Coddington. The declaration was upon the money counts and an account stated and copy note with notice. Plea—General issue and notice of special matter. The cause was tried before his Hon. Justice VANDERPOEL, on the 27th December, 1843. Upon the trial the plaintiffs produced in evidence a promissory note, a copy of which was served with the declaration, together with a notice that the same was a copy of a promissory note on which this action was brought, and which would be given in evidence under the money counts contained in the declaration, and that the same was the only case of action on which the plaintiffs relied in the suit; and the signatures of the maker and of the defendant as endorser of the note having been admitted by the counsel of defendant, the said note and endorsement were read in evidence to the jury in the words and figures following, to wit:

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\$10,000 00. New-York, December 31st, 1839.

Thirty days after date I promise to pay to the order of Samuel Coddington, ten thousand dollars, with interest at 7 per cent. from date.

D. B. c. 406.

THOMAS B. CODDINGTON.

No. 437, due 2 Feb'y.

(Endorsed)

SAM'L CODDINGTON.

The plaintiffs' counsel then produced a letter from the said defendant to the said plaintiffs, dated January 28, 1840, and the signature of the defendant thereto having been admitted by his counsel, the said letter was read in evidence to the jury, and is in the words and figures following, to wit :

Messrs. Davis, Brooks & Co.

Gent.

Please not protest T. B. Coddington's note due 2nd February, for ten thousand dolls., and I will waive the necessity of the protest thereof. And oblige, resp'y, &c.

New-York, Jan. 28, 1840.

SAM'L CODDINGTON.

The plaintiffs then rested.

The counsel for the defendant then moved for a non-suit on the ground that the plaintiffs had not proved a sufficient demand on the maker, and notice of non-payment of the note to the endorser, at the time the said note became due, and that the said letter from the defendant to the plaintiffs did not contain a waiver of such notice, but his honor the judge overruled the motion, and the counsel for the defendant excepted.

The counsel for defendant then opened the case to the jury.

The said defendant served with his plea of the general issue, a notice of which the following is a copy :

Please to take notice that the said defendant, at the trial of the above cause, will insist upon and give in evidence under the general issue above pleaded, that after the supposed promises and undertakings of the said defendant, and after the making of the promissory note by Thomas B. Coddington, upon which this action is brought, and before the commencement of this suit, the said plaintiffs released and discharged the

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said Thomas B. Coddington from the payment thereof, and also that said plaintiffs, after the making of said note, and before the commencement of this suit, extended the time for the payment of the debt, for which said promissory note was given, by an agreement made by and between the said plaintiffs and the said Samuel Coddington, and which agreement was made by and between the said plaintiffs and the said Thomas B. Coddington, without the knowledge or consent or sanction of the said defendant; and also that said Thomas B. Coddington, after the making of said note, and before the commencement of this suit, made an assignment of all his property to Charles Davis, one of said plaintiffs, to secure the payment of said note and other debts due by said Thomas B. Coddington to said plaintiffs and other persons; and that said plaintiffs thereupon agreed to and did release, discharge, and forever acquit said Thomas B. Coddington from the payment of said promissory note beyond what said plaintiffs should realize from said assignment to said Charles Davis, they, said plaintiffs, assenting to said assignment and coming in under the same; and also that said plaintiffs, after the making of said note and after the execution of said assignment, but before the commencement of this suit, agreed to and with said Thomas B. Coddington, in consideration of said assignment and other considerations, to come in under said assignment to Charles Davis, and receive their proportion of the proceeds thereof, and to look solely to the proceeds thereof for payment of said note until said assignment should be finally closed; and that then and in case the proceeds of the same should not fully pay the amount secured by said note, said plaintiffs then agreed to extend and did extend the time for the payment of whatsoever balance might be and remain unpaid on said note, out of the assets of said assignment; and that said agreement was made by and between said plaintiffs and said Thomas B. Coddington, without the knowledge, consent, or sanction of defendant.

Dated New-York, August 17th, 1843.—Yours, &c.

To C. C. KING, Esq.

Att'y for pl'ffs.

LIV. LIVINGSTON,

Att'y for def't.

Coddington *agt.* Davis and others.

The counsel for defendant produced a written agreement bearing date the 8th day of February, 1840, signed by the plaintiffs and other creditors of the said Thomas B. Coddington, and the signatures of the plaintiffs thereto having been admitted by counsel for plaintiffs, the same was read in evidence to the jury, and is in the words and figures following, to wit:

Whereas Thomas B. Coddington of the city of New-York is indebted or liable to us for certain debts or liabilities heretofore incurred by said Coddington, and said Coddington has made an assignment of his property to Charles Davis, Esquire, of the city of New-York, for the benefit of us and other creditors of said Coddington, now in consideration of one dollar paid to us by said Coddington, and which we hereby severally acknowledge to have received, and in consideration of said assignment and a promise on the part of said Coddington hereinafter mentioned—

We, the creditors whose names are hereto subscribed, do hereby release, discharge, and forever acquit said Coddington, his executors and administrators from all claims, demands, liabilities, engagements, judgments, and other responsibilities now existing against said Coddington, beyond what we shall respectively realize of said claims, &c., from said assignment to Charles Davis, dated the 23d of January, 1840, we receiving or assenting to the conditions of said assignment and coming under the same for a full and perfect discharge of said claims, &c., said Thomas B. Coddington, in consideration of the above, giving us severally a written promise to pay us at the expiration of seven years from the date of this instrument, whatever balance of said claims should remain unpaid out of the assets of said assignment.

Witness our hands this eighth day of February, 1840.

Words "his executors and administrators," and word "claims, &c.," interlined before signing.

Pierson & Co.	Davenport & Quincy,
Frederick A Gay,	George W. Shields,
E. J. Elting,	John C. Cass,
Davis, Brooks & Co.	Geo. B. Morewood & Co.

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The counsel for the defendant then produced, and the execution thereof having been admitted, read in evidence to the jury an assignment made by the said Thomas B. Coddington to Charles Davis, one of the said firm of Davis, Brooks & Co., and one of the plaintiffs, dated January 23, 1840, and Charles Davis's acceptance of the same, and which are in the words and figures following, to wit :

TO ALL TO WHOM THESE PRESENTS SHALL COME. I, Thomas B. Coddington, of the city of New-York, send greeting :

Whereas, I am indebted unto various persons and in various sums of money, and owing to combined causes my business and affairs not having proved as prosperous and successful as anticipated, and being desirous of appropriating my assets and property to the payment of my indebtedness as hereinafter mentioned. Now know ye, that I, the said Thomas B. Coddington, for the purposes hereinafter mentioned, and for divers good causes and considerations, me thereunto moving, have granted, bargained, assigned and set over, and by these presents do grant, bargain, assign and set over unto Charles Davis, Esquire, merchant of the city of New-York, and to his executors, administrators and assigns forever, all, and all manner of goods, chattels, debts, moneys, and all other things of me, the said Thomas B. Coddington, of whatsoever nature or kind, and which are set forth and contained in a schedule hereto annexed marked L; or at present in my store number forty-three Broad-street, in the city of New-York. To have and to hold the same unto the said Charles Davis, his executors, administrators and assigns forever, in trust, nevertheless to collect and receive all the said debts mentioned in said schedule L, and for that purpose to prosecute suits or adopt other proper measures to effect that object, and in trust also, to convert the said property or merchandize mentioned in said schedule into cash, by sale or otherwise, as may be deemed most advantageous, and then out of the moneys realized from said collections or said property, in the first place to pay all expenses incident to this assignment, and collecting said debts, and making said sales, and in the second place to pay and discharge the debts owing

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by me, the said Thomas B. Coddington, and mentioned and contained in the schedule hereto annexed marked A ; and if there should not be sufficient to pay said debts in full, then to pay them in equal proportions according to their amounts. And in the third place, after paying the said debts mentioned in schedule A, then to the debts mentioned in the schedule hereto annexed marked B, and all other debts or liabilities whatever, either due or to grow due, but contracted for previous to this assignment, and in case there should not be sufficient to pay said debts in full, then to pay them in equal proportions as far as said moneys will go, and in case of any surplus after paying all my said debts and liabilities, to pay over the same to me, my executors or administrators. And I do hereby authorize my said assignee to compound, compromise and arbitrate any debt or debts so due or owing to or by me as aforesaid, and acquittance or other sufficient discharge on payment or settlement, to give and execute, hereby giving him full power and authority in the premises, and to bring suits and adopt all lawful ways and means for the recovery and collection of said debts in my name or otherwise as may be necessary, and to appoint one or more attorney or attorneys under him.

Hereby confirming whatsoever he may lawfully do in the premises. It being intended by this assignment that said Charles Davis shall act with all reasonable diligence in realizing said assets assigned, with a view to the best interests of the parties concerned, and appropriating said assets in the manner above directed.

In witness whereof, I have hereto set my hand and seal, this twenty-third day of January, eighteen hundred and forty.

THOMAS B. CODDINGTON.

Signed, sealed and delivered }
in the presence of } OLIVET BRYAN, JR.

I, Charles Davis, the assignee above named, do hereby accept the above assignment, and engage and agree to execute the same according to its provisions.

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Witness my hand this twenty-third day of January, eighteen hundred and forty.

CHARLES DAVIS.

Witness, I. PICKERSGILL.

SCHEDULE A.

Samuel Coddington for endorsement,	10,000	00	
do. do. for do.	1,185	44	
do. do. for bal. of account,	2,178	40	13,363 84
Davis, Brooks & Co.	1,000	00	
James Taylor for account	373	79	
Joseph Meeks for rent	250	00	

Schedule B contains a list of other creditors and the amount due each. Schedule L contains assets in bills receivable and book accounts.

And all other claims and demands belonging to said Coddington at the time of assignment, of whatever nature or kind.

The counsel for the defendant then produced, and the signatures thereto and endorsements thereon having been admitted, read in evidence to the jury, an order dated 24th January, 1840, drawn by the defendant upon and received and accepted by the said Charles Davis, on the said 24th January, 1840, which order was received by the plaintiffs from the defendant, and was produced at the trial upon the call of the defendant, and is in the words and figures following, to wit :

Staten Island, January 24, 1840.

To Charles Davis, Esq.

Assignee, &c., New-York.

Sir,

Please pay to the order of Messrs. Davis, Brooks & Co. any and all moneys that may be received by you as assignee for my account of Tho's B. Coddington, as fast as collections to the extent of ten thousand dollars, for value received.

SAMUEL CODDINGTON.

Accepted to pay
conformably to the
order and terms of
the assignment of
T. B. Coddington.
C. Davis, Ass'ee.

Witness to date, 24th
January, 1840, and sig-
nature of C. Davis, as-
signee, J. Pickersgill.
24 January, 1840.

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The counsel for the plaintiffs then, upon notice for that purpose given them, produced at the trial, and the defendant's counsel then offered and read in evidence to the jury, on the part of the defendant, a written promise of the said Thomas B. Coddington to the said Davis, Brooks & Co., the said plaintiffs, dated February 8th, 1840, in the words and figures following, to wit :

I hereby promise to pay Messrs. Davis, Brooks & Co., whatever they may not realize from my assignment to Mr. Chas. Davis on account of my indebtedness to them in notes, book accounts, endorsements, or otherwise, at the expiration of seven years from the date hereof.

New-York, Feb. 8, 1840.

THOS. B. CODDINGTON.

It was then admitted that the said Thomas B. Coddington delivered over to the said Charles Davis, the assignee, a large amount of property under the said assignment; that the said assignee has not yet sold or disposed of all the said property, and that said assignment has not been closed: that the said Charles Davis, the assignee, had made collections under the said assignment, that the whole net amount of the proceeds of the assigned premises which had been received by him as assignee, and for which he was accountable on the twenty-first day of December, 1843, amounted to three thousand one hundred and nine dollars and seventy-four cents, subject to his charge for commissions, if the same were allowable; that this amount had been paid over by him to Davis, Brooks & Co.; that so much thereof as the said defendant was entitled to receive under the said assignment, had been paid over to the said plaintiffs by the said Charles Davis under the said order from defendant to said Charles Davis, dated January 24, 1840, and were estimated at the time of the trial to amount to \$2,800, and which the plaintiffs had applied in part towards the satisfaction of the note.

The counsel for the defendant then rested.

The counsel for the plaintiffs then produced, and the same being admitted, read in evidence to the jury a letter from

Coddington *agt.* Davis and others.

Thomas B. Coddington to Davis, Brooks & Co., dated 25th January, 1840, as follows.

(Counsel for defendant objected to the reading of the same to the jury, which objection was overruled by the judge, and defendant's counsel excepted to the decision.)

New-York, January 25, 1840.

Gent.

I have to inform you that I have been under the necessity of making an assignment.

Mr. Charles Davis, of the firm of Davis, Brooks & Co., is the assignee, and Mr. James Taylor of No. 72 Broad-street is the attorney to whom I would refer you for information relating to my late business.

Yours respectfully,

To Messrs. Davis, Brooks & Co. THOS. B. CODDINGTON.

The counsel for both parties then rested.

The counsel for the defendant then asked the court to charge the jury as follows :

FIRST—That the letter of the defendant of 28th January, 1840, waiving the necessity of protest of said note, did not waive the necessity of the plaintiffs demanding payment of the maker, and that plaintiffs were bound to prove on the trial of this cause a demand of the maker for payment, the same as if said letter had not been written.

SECONDLY—That the said letter of the defendant of 28th January, 1840, did not waive notice of non-payment of said note to the defendant, the endorser on said note, and that plaintiffs were bound to prove on the trial of this cause a notice of the non-payment of said note, the same as if said letter had not been written.

THIRDLY—That the written instrument signed by plaintiffs and others, dated 8th February, 1840, was a valid release and discharge by said plaintiffs of the maker of said note from all liability thereon, which discharged the liability of the endorser on said note.

FOURTHLY—That the plaintiffs signing said written instrument of 8th February, 1840, and receiving from said Thomas

Coddington *agt.* Davis and others.

B. Coddington his written promise to pay any balance, &c., in seven years thereafter, if not a valid discharge and release as above, was a valid extension of time to the maker of said note, which discharged the endorser on said note from all liability thereon.

FIFTHLY—That the plaintiffs having agreed by said instrument to come in under said assignment for a full and perfect discharge of all claims by them against said Thomas B. Coddington, could not sue said Thomas B. Coddington or said defendant, until said assignment was closed by said assignee, and that this suit was prematurely brought.

The judge charged the jury—That the plaintiffs having received from the defendant the letter of the date of 28th January, 1840, were not required to demand payment of the note of the maker, or to give notice to the defendant as endorser, of the non-payment of the same by the maker; and that the want of such demand and notice were not available to the defendant at the trial as a defence to the action.

And that the plaintiffs did not by the written instrument of the 8th February, 1840, signed by them, and in evidence before the jury, or the matters therein contained, discharge the defendant from his liability as endorser to pay the said note.

And that the plaintiffs signing the said written instrument and receiving from Thos. B. Coddington his written promise of the date of 8th February, 1840, also in evidence before the jury, was not such an extension of time to the maker of the note as discharged the defendant from his liability thereon, as endorser thereof, but that the liability and obligation of the defendant for the payment of the said note, if otherwise unimpaired and in force, continued obligatory upon him, notwithstanding the said instrument of writing so signed by the plaintiffs, and the said written promise so given to them by said Thomas B. Coddington.

And that the right of the plaintiffs to call upon the defendant for the payment of said note is not thereby deferred, nor the present suit for that cause prematurely brought.

To all which the defendants' counsel then and there excepted.

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And the jury thereupon rendered a verdict for the said plaintiffs, for nine thousand nine hundred and ninety-two dollars and fifty-four cents.

The defendant brought a writ of error and removed the judgment to the supreme court, where, in May term, 1846, the judgment of the superior court was affirmed, ——— Justice, delivering the opinion of the court. (*Reported*, 3 *Denio*, 16.)



The defendant brought a writ of error and removed the judgment to this court.

*Livingston & Van Antwerp, Attorneys, and
Samuel Stevens & L. Livingston, Counsel for plaintiff in error.*

First. The letter of defendant of 28th January, 1840, waiving the necessity of protest of the note, did not waive the necessity of the plaintiff demanding payment of the maker, and giving notice of non-payment to the defendant.

1. Demand of payment and notice of non-payment, are distinct and different acts from that of protest, and in cases where it is not necessary to protest, a demand must be made and notice of non-payment given; and when a protest is necessary, notice must also, *that is in addition* to the protest, be given to the endorser. (3 *Kent*, 93, 4, 4th ed.)

Protest is the official act of a notary, and although usual, is not necessary in the case of an inland bill. A demand by the holder, or any person for him, and notice of non-payment to the endorser, is sufficient.

In the case of foreign bills where a protest is necessary, it is only evidence that a demand was made. It is neither notice, nor evidence that notice has been given to the endorser. (*Fittler v. Morris*, 6 *Wharton*, 406, 415; *Bank of Rochester v. Gray*, 2 *Hill*, 231, 227.  *Story Bills*, 302, note 2, 311, 346, 360; *do. from notes*, 346, 315; 6 *Wheat*. 572 *in point*; 4 *Cranch*, 141; 5 *Leigh*, 529; 17 *Wend*. 99; 4 *Hill*, 420; 7 *Wend*. 165; 9 *Wend*. 121. )

It is no part of the duty of a notary to give this notice. (*Morgan v. Van Ingen*, 2 *Johns. Rep.* 206; *Brook's Office of Notary*, pp. 79, 139.)

Coddington *agt.* Davis and others.

A waiver of protest where a protest is necessary, would not therefore be a waiver of demand; and, in this case, it is neither a waiver of demand or notice.

A waiver of notice of non-payment, is not a waiver of a demand. (6 *Massachusetts Reports*, 524; 11 *Wend. Rep.* 633.)

2. A protest being an act of a public officer, AFTER demand, (*Jacob's Law Dictionary*, 330—title, *Bills of Exchange*, 4,) and before notice, and being neither a demand or notice, a waiver of the protest, (especially of an inland bill,) is neither a waiver of demand or notice. (*Chitty on Bills*, pp. 362, 3, ed. of 1836; *Leftly v. Mills*, 4 *T. R.* 175; *Gale v. Walsh*, 5 *T. R.* 239; *Rogers v. Stevens*, 2 *T. R.* 713.)

The judge had no right to assume that the defendant meant anything more than he said. What he did say is IN WRITING, and the law cannot extend it beyond the legal meaning of the words used.

The law presumes all the parties knew the meaning of the words made use of; besides all the parties are merchants, and must be presumed to know the meaning of the terms made use of in the law-merchant.

Second. The assignment by the maker of the note of all his property for the benefit of his creditors, giving preference to the defendant, for the amount of the note in question, did not exonerate the holders of the note from demanding payment, and giving notice of non-payment.

1. The assignment was not to the defendant, but to one of the plaintiffs; it gave the defendant no control of the property.

2. It was not made at the request, or with the privity of the defendant.

3. The defendant, as soon as he knew of the assignment, and the day after it was made, transferred all his interest under it to the plaintiffs, which was accepted by them.

4. It follows, therefore, that the plaintiffs are in fact the persons who are preferred, to the amount of this note, in the assignment of the maker.

Third. The written instrument, signed by the plaintiffs and others, dated 8th February, 1840, was a valid release and dis-

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charge by the plaintiffs of the maker of said note, from all liability thereon, and the endorser was also thereby discharged. (6 P. 416; 8 P. 236.)

1. The assignment by the maker of all his property, for the payment of the plaintiffs and others, and the new written agreement by the maker, to pay the plaintiffs in seven years whatever balance there might be, after applying the assigned property towards the payment of these demands, was a sufficient consideration to support the release. (*Heathcote v. Crookshanks*, 2 T. R. 27, 8; *pr.* BULLER, J.)

2. The execution of it by one of the plaintiffs, in the name of the firm, was sufficient. (*Pierson v. Hooker*, 3 Johns. Rep. 68; *Bulkley v. Dayton*, 14 do. do. 387; *Austin v. Hall*, 13 do. do. 286.)



After the execution of this assignment and new agreement by the maker of the note, to pay any balance, and the execution, by the plaintiffs, of the instrument releasing the maker from all demands, no action could be maintained on this note by the plaintiffs against the maker. (*Hosack v. Rogers*, 25 Wendell, 313, 14, and 355, 6.)

And if plaintiffs could maintain no action on the note against the maker, most clearly they cannot against the endorser.


Fourth. If the position contended for in the last point should not be sustained by the court, then we insist, that the said assignment and new agreement to pay the balance, if any, in seven years, by the maker, and the release to him by the plaintiffs was a valid extension to the maker of the time of payment for any balance there might be due, for seven years, and the endorser was thereby discharged. (3 Kent, 111, 4th ed.)


Fifth. If the endorser should not be deemed to have been discharged by the transaction between the maker and the plaintiffs, clearly the plaintiffs could maintain no action against the maker on this note, until all the assigned property had been applied, and the balance remaining due thereby ascertained; and so long as the plaintiffs are precluded, by their own agreement and acts, from maintaining an action against the maker, their remedy is suspended against the endorser.

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Sixth. The court below erred, in admitting the letter of T. B. Coddington, of the 25th January, 1840, to go to the jury as evidence against the defendant.  3 *Cow.* 621; 6 *H.* 292. Not proper evidence: if proper, should have been proved by the oath of witness. This is no better than hearsay. 

For these reasons it is submitted, that the judgment of the court below should be reversed.

 *Samuel Stevens, in Reply.* Waiver must be decided on the letter alone—so decided at the circuit before other evidence before the court. If the other ground had been started at the circuit we might have answered it. (*Story on Cont.* § 235, 245-7; *Vattel, B. II, c. 17*, § 263.—*Protest* has a legal meaning. No ambiguity. (*Jac. L. D.* 330; *Bill Exch.* 4.)—Endorser is surety. (3 *Kent*, 109; 2 *J.* 206; 8 *Wend.* 514, 516; 3 *Kent*, 124; 2 *H.* 231.)

Assignment of property does not alter case, unless it be such a case as to make *the endorser the debtor*; or make it his duty to pay the debt. Assigning as *security* does not dispense with the necessity of demand. (7 *Wend.* 165; 17 *Wend.* 489; 4 *Watts & Serg.* 478; 5 *Leigh*, 529; 7 *Hill*, 122; 5 *Hill*, 190; 2 *Denio*, 182.) One instrument referring to another. (10 *Wend.* 473, directly opposed to two cases cited from 18 *Pick.*, and so all the English cases on composition deeds.) 

Charles C. King, Attorney, and

Charles O'Connor, Counsel, for defendants in error.

First. The plaintiffs below were entitled to recover, on the endorsement of the defendant below, without proof of demand or notice.

1. The word “protest,” contained in the defendant’s waiver, dated January 28, 1840, has been adopted in legal and mercantile language, as comprehending *demand and notice*, when applied to a promissory note. (*Union Bank v. Hyde*, 6 *Wheaton*, 572; 6 *Ad. & El.* 167, 180; *Laws of 1833*, p. 394, § 8; *id.* 1837, p. 554, sec. 1; 15 *East*, 505; *Utica Bank v. Smedes*, 20 *Johns.* 377-384.)

2. Although a waiver of notice may not be a waiver of

demand, (6 *Mass. R.* 525, 11 *Wend.* 683,) yet the converse is not true. A waiver of demand necessarily implies a waiver of notice. (*Spencer v. Harvey*, 17 *Wend.* 490.)

3. Independent of the letter of January, 28, 1840, plaintiffs were relieved by the other circumstances of the case from making demand or giving notice. Immediately prior to the maturity of this note, the maker executed an assignment of all his effects, in which he treated the note as a debt *due to the defendant*, and *in that character* gave it priority of payment. The defendant assented to this assignment, took possession of the fund thereby awarded to him, *as creditor of the assignor in respect of this note*, and transferred such fund to the plaintiffs, in part payment. By this act the defendant assumed the office of paymaster, in respect to this note. (*Corney v. Pacosta*, 1 *Esp.* 303; *Bond v. Farnham*, 5 *Mass.* 171; *Com. Bank v. Hughes*, 17 *Wend.* 98; *Moore v. Small*, 2 *Greenleaf*, 210; 3 *Kent's Com.* 113; 17 *Wend.* 412; 2 *Conn't R.* 478; 1 *Johns. Cas.* 99; *Boyd v. Cleaveland*, 4 *Pick.* 527.)

☞ Same thing in effect as though S. C. had been the assignee. Assignment for his benefit, and he had fully assented to it. ☞

Second. The so-called release includes only the debts due to Davis, Brooks & Co., mentioned in the assignment *as such*, and does not include the \$10,000 note now in question. The assignment places that note in the attitude of a debt due to the defendant; it being tacitly assumed that he would be obliged to pay it to the plaintiffs.

1. The assignment and release should be read together, in construing the latter. ☞ Don't apply to this note. ☞ (10 *Wend.* 479; 1 *Ridgway's Parl. Cases*, 461; 4 *Wend.* 74; 2 *Bl. P. C.* 60; 5 *Cow.* 210; 2 *Bailey's S. C. Law R.* 145; 8 *Mass.* 214; 1 *T. & Russell*, 52; 3 *Man. & Ry.* 406.)

2. In construing releases, regard is had to the end in view; and general words are always restrained to the purposes expressed by the *special* words contained in the instrument. (1 *Edw. R.* 39; 1 *B. & Ald.* 104; *Jackson v. Stackhouse*, 1 *Cow.* 123-126; *Lampon v. Corke*, *B. & Ald.* 606; 7 *Com. Law.* 205;

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Bruen v Marquand, 17 *Johns.* 61; *Duffy v. Orr*, 1 *Clark & Finelly*, 253; 5 *Bl. N. S.* 620; 18 *Pick.* 327, 346, 353; ~~18~~ *Tayler v. Homersham*, 4 *M. & Selw.* 422; *Simons v. Johnson*; 3 *B. & Ad.* 175; 23 *Com. Law*, 50; 2 *Brod. & Bingh.* 51; 6th *Com. Law*, 16; 15 *C. L.* 503, to prove these cases not overruled. (S)

Third. The so-called release is wholly inoperative and void.

1. It is without seal. (*Crawford v. Millspaugh*, 13 *Johns.* 87; 2 *J. R.* 449.)

2. Their promise to pay in seven years is no consideration. (*Boyd v. Hitchcock*, 20 *J. R.* 78; *Hughes v. Wheeler*, 8 *Cow.* 77; 5 *T. R.* 516; 1 *Wend.* 172; 3 *Wend.* 66.)

3. The assignment, being a prior voluntary act of T. B. Coddington, not done at the request of Davis, Brooks & Co., cannot operate as a consideration. (17 *J.* 174; 1 *Chitty's Plg.* 296, note 1, *Springfield ed.* 1840; 1 *Caines R.* 286; *Bartholomew v. Jackson*, 20 *J. R.* 28; 2 *Harrison's N. J. R.* 387; 11 *Ad. & Ellis*, 348; 5 *J. R.* 277; 7 *Cow.* 360; *Allen v. Roosevelt*, 14 *Wend.* 103.)

4. The so-called release, if applicable to the note in question, would not be effectual as an extension of credit. (3 *Kent's Com.* 111, and notes; *McLemore v. Powell*, 12 *Wheaton*, 554.)

DECISION.—Judgment affirmed. GARDINER, BRONSON, JEWETT, JONES & WRIGHT, J. J., *for affirmance.* RUGGLES, GRAY & JOHNSON, *for reversal.*

NOTE.—GARDINER, J., delivered the prevailing opinion of the court, and said: That the term "protest," in a strict technical sense, is not applicable to promissory notes. The word, however, has by general usage acquired a more extensive signification, and in a case like the present includes *all those acts which by law are necessary to charge an endorser.*

And that the letter of the endorser of the 28th January, 1840, furnished *prima facie* evidence of an intent by the endorser to waive demand of payment and notice, to which he was otherwise entitled.

On the point that the written statement signed by the plaintiffs and others, dated 8th February, 1840, was a valid discharge by the plaintiffs of Thomas Coddington, the maker of the note, from all liability thereon, and consequently of the endorser—*held*, that taking the schedule (A) in connection with the assignment, and the written direction of the defendant to Davis, as assignee, on

Coddington *agt.* Davis and others.

the 24th of January, the defendant recognized this as a debt due from Thomas Coddington to *himself*, by claiming under the assignment by which it was so declared, and as a debt due *from him* to the *plaintiffs* by a voluntary application of his private funds to its payment.

The discharge refers to and absolutely adopts the assignment, with all its conditions and provisions as its basis. And the engagement entered into by Thomas Coddington at the time of the execution of the release confirms this view.

The discharge being legally binding upon the parties, it does not extend to this demand, and cannot have the effect either to discharge or extend the time of payment of the note in question.

RUGLES, J., delivered a *dissenting* opinion, in which he discussed only the effect of the instrument called the discharge, dated on the 8th February, 1840, signed by Davis, Brooks & Co., and said :

"Finally. From reading the three instruments together, that is to say, the assignment and schedules, the discharge and the written promise of T. B. Coddington, I am brought to the following conclusions :

"*First.* That by the assignment and schedules, without reference to any other paper, Davis, Brooks & Co. were entitled to the dividends on the \$10,000 debt, mentioned in schedule A, as the creditors of *T. B. Coddington*, although that debt was set down against the name of Samuel Coddington as endorser.

"*Second.* That by the recitals in the discharge, *Davis, Brooks & Co.* referred to the debts due from T. B. Coddington to them, of which this was the principal one, and therefore include this debt: that they do not refer to the debts set down to the names of *Davis, Brooks & Co.*, and therefore do not exclude it.

"*Third.* That the operative words in the body of the discharge are amply sufficient to include the debt in question, and do include it.

"*Fourth.* That the obvious meaning of the discharge was, that it should operate on all debts on which the creditors who signed it were respectively entitled to dividends; and,

"*Fifth.* That *Davis, Brooks & Co.*, in conformity with this construction, took Thomas B. Coddington's written promise to pay, at the end of seven years, the balance that might remain due on this note, and on his other debts, after deducting what might be realized from the assignment."

And was therefore of opinion that if the instrument signed by Davis, Brooks & Co. of the 8th February, 1840, did not entirely discharge *Thomas B. Coddington* from all liability on the \$10,000 note as maker, it operated beyond a doubt to *extend the time of the payment of the debt until the expiration of seven years from the date of the instrument*, and therefore discharged the endorser. That the judgment of the supreme court should be reversed, and a new trial granted.

Reported, 1 Comstock, 186.

Mead *agt.* Lawson.

MEAD, plaintiff in error, *agt.* LAWSON, defendant in error.

Questions discussed.

1. Whether a written contract for the sale of land was void for uncertainty, in the *description* of the land contracted about?

2. Whether if the description of the premises was ambiguous, it was competent for the court to receive evidence of extrinsic circumstances to sustain the contract?

This was an action brought by Mead against Lawson for a breach of contract for the purchase of land lying in the town of Coeymans, Albany county, commenced in a justice's court, and brought to the Albany common pleas by appeal, and tried on the 17th of September, 1844.

The plaintiff on the trial of this cause in the court of common pleas produced and read to the court and jury a contract made and executed by and between the plaintiff and the defendant, the execution of which contract was admitted by the counsel for the defendant, and of which the following is a copy:

Articles of agreement made the 30th day of October, 1841, between David Mead of the town of Coeymans and county of Albany, and James Lawson of the same place witnesseth, that the said David Mead hath this day sold a certain piece of land situate in said town, supposed to contain about six or eight acres of land, commencing at John Mead's line, at a stone marked J. L., from thence easterly to Henry Keefer's line, and said James promises, and agrees to pay to the said David, in consideration for said premises, three hundred dollars, lawful money of the state of New-York, on the delivery of a deed sufficient in the law for holding real estate, said deed to be executed and ready for delivery within thirty days. In witness whereof, the parties have interchangeable set their names interchangeably.

DAVID MEAD.

JAMES LAWSON.

The plaintiff then called *John Mead* as a witness, who testified that he was a brother of the plaintiff, and knew the piece

Mead *agt.* Lawson.

of land described in the contract; he drew a deed of it from the plaintiff and his wife to the defendant: the deed was then produced and identified by the witness and read in evidence. It was dated the 23rd November, 1843, and described the land as follows: "Beginning at a stone set in the ground, marked J. L. as a corner stone between John Mead and James Lawson, from thence easterly to Henry Keefer's line, thence north along the said line till it intersects a lot of land in the possession of the heirs of Levi Blaisdell, thence west along the said line of the said heirs of Levi Blaisdell and the said Lawson, till it intersects a lot of land that formerly belonged to John Mead, and some time last summer was sold and conveyed to the said James Lawson, thence along the said line of the said David Mead and the said James Lawson, to the place of beginning to the said corner stone marked J. L., supposed to contain six or eight acres." The witness said that the next morning after the deed bears date he and the plaintiff went and tendered the deed to defendant Lawson, who said he would not have anything to do with it. The witness said he drew the description in the deed of the lot by the boundaries given in the contract as far as they went, and then added the additional boundaries, well knowing the piece of land, and bounded part of the lot by his own knowledge of the piece of land. The plaintiff's counsel put this question to the witness: Did you describe in the deed the same piece of land described in the contract? The question was objected to, and the objection sustained, and the question overruled by the court, and the plaintiff excepted. The plaintiff's counsel asked the witness, How much land has your brother there? which question, after objection, was overruled by the court, and the plaintiff's counsel excepted. The plaintiff's counsel then asked the witness, Did the premises in question include all the land your brother owned there, or were they part of a larger lot? This question, after objection, was overruled by the court, and the plaintiff's counsel excepted. The counsel for both parties then admitted, that drawing a line, commencing at the stone marked J. L., in John Mead's line, and extending due east to Henry Keefer's line, leaves a lot be-

Mead *agt.* Lawson.

longing to the plaintiff on the north side of said line of four acres and seven tenths of an acre of land, and on the south of that line of fifty acres. A map was then introduced, showing the shape and form of the premises owned by the plaintiff on both sides of the line above mentioned. Witness testified that he knew where the stone marked J. L. stood; it was the corner stone between his land, Lawson's, and his brother the plaintiff. The plaintiff's counsel then offered as evidence, and proposed to prove by the witness, that a short time before the date of this contract the defendant had purchased a piece of land of the witness, lying directly west of and adjoining the lot of plaintiff, lying north of the line running from the stone J. L. to Keefer's line, of the same width with the piece of land lying north of that line, and that the stone marked J. L. was the south-east corner of that piece of land as marked out on the map above mentioned; to all and every part of which the counsel for the defendant then and there objected, on the ground, first, that the facts offered to be proved could not be proved by parol; secondly, the testimony offered was irrelevant, and the objection was sustained by the court on these grounds, to which the plaintiff excepted.

The plaintiff's counsel then inquired of the witness, Does the four and seven-tenths acre lot make Lawson's land square? This question was, after objection, overruled by the court, and the plaintiff excepted.

On his *cross-examination* witness said, the four seven-tenth acres and the fifty acres was a whole field, not fenced apart at all; he did not know where the line, from the stone J. L. east or easterly, would strike the line of Henry Keefer's; never saw such a line, and never knew of its being run; thought the deed did not contain or convey the whole of the cleared field, the cleared field contained about an acre more than the deed; to take in all the cleared field would make a crooked line; a line due east would take off some woodland.

This is the substance of the testimony by the only witness sworn on the trial. The defendant moved for a nonsuit on the grounds, *First*, That the contract, as proved, was void on its

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face; *Second*, That if valid, the plaintiff had proved no damages, and was entitled only to nominal damages, which was six cents, and was equivalent to a nonsuit. The court sustained the motion, and nonsuited the plaintiff, whereupon the plaintiff excepted.

The plaintiff brought a writ of error, and removed the judgment to the supreme court, where, in May term, 1846, it was affirmed.

NELSON, Ch. J., delivered the opinion of the court, as follows: "The contract is void for uncertainty in the description of the premises; a location must depend altogether upon conjecture—nothing but the starting point, and one line is given from which to ascertain the boundaries, and even the course of that line quite indefinite.

"The description of premises; to which any effect can be given, must be either perfectly certain of itself, or capable of being made so by a reference to something extrinsic the contract. (13 J. R. 300.) Here nothing is referred to extrinsic by which to define the parcel—everything is blank in and out of the agreement. It is impossible to say on which side it lies of the line given. That the parties knew the localities, or parcel contracted for, is nothing; the question is, have they sufficiently described it in the written instrument, which is alone the only competent evidence of their object and intent in the matter; and bringing the case down to this test, it is impossible to entertain a doubt about it. *Judgment affirmed.*"

The plaintiff, Mead, brought a writ of error, and removed the judgment into this court.

*Wheaton, Doolittle & Hadley, attorneys and
Henry G. Wheaton, Counsel for plaintiff in error.*

First. Every contract fairly made between the parties to it, should be carried into effect, unless some insuperable objection intervenes to prevent it. "*Ut res magis valeat, quam pereat.*" (25 W. 402; 21 do. 651.)

Second. No contract should be held void for ambiguity, provided its meaning and the intent of the parties to it can be

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ascertained by means of competent extrinsic testimony. (*C. & H.* 1383.)

Third. All evidence is competent to explain an ambiguous contract which contributes to place the judicial body, called upon to interpret and enforce it, in the same position, and confer upon it the same knowledge of the subject matter which the parties possessed at the time they made the contract. (2 *Cowen & Hill's Notes*, 1399, note 957; *Wigram on Extr. Evidence*, 59; *Fish v. Hubbard*, 21 *Wend.* 651; *Dygert v. Plitts*, 25 *Wend.* 402; 1 *Greenleaf on Ev.*, § 282 to 300; *Story on Contracts*, § 267; 1 *Greenleaf on Ev.* 301, n. 2.)

Fourth. If the ambiguity, as in this case, relates to or is found in the description of the subject matter of the contract, it is competent for the court to receive evidence of all such extrinsic circumstances as being known to the parties when they made the contract enabled them to understand about what they were contracting, and having received such evidence, if with its help the court can ascertain the subject of the contract, it should not be held void for uncertainty. (1 *Greenleaf on Ev. ch.* 15.)

So that in this case, if with a knowledge of the extrinsic facts known to the parties, the court can locate the premises in question, the contract should be sustained.

Fifth. The objection to the contract in question is, that it is void for uncertainty in the description of the premises contracted to be sold; and this is so unless from the contract itself, together with such extrinsic circumstances as it is competent to prove, the premises can be ascertained with reasonable certainty.

Sixth. In the description of the premises, as given in this contract, three particulars are presented:

1. It is a piece of land supposed to contain about six or eight acres.

2. The boundary commences at a stone marked "J. L."

3. "From thence easterly it runs to Henry Keefer's line."

§ 1 *J.* 156, easterly is east.

Seventh. Now from this description taken in connection with the testimony given and offered, could it be ascertained with

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reasonable certainty what piece of land was embraced in the contract in question?

1. The starting point, the stone marked "J. L.," is certain.

2. The line running *easterly* to Keefer's line is a due east line.

3. The size of the piece of land is given with some certainty, it being about six or eight acres. (*Brant v. Ogden*, 1 *Johns. Rep.* 156.)

Eighth. Now, looking at the evidence in the case and the map, it appears the plaintiff owned a piece of land containing fifty-four seven-tenth acres; and that the given line starting from the stone marked "J. L." and running due east to Keefer's line, cuts off a piece of the said land measuring four seven-tenth acres, and to reach the defendant's premises from the given point in Keefer's line, it is necessary to run north on the eastern boundary of the four seven-tenth acre lot. It was further offered to be proved that defendant owned land west of the four seven-tenth acre lot as far south as the stone marked "J. L.," and that the four seven-tenth acre piece would make his farm square, and that he owned no land adjoining the part of plaintiff's land which lies south of the given line. Now from these facts is not the piece of land contracted for clearly ascertained?

Joseph S. Colt, Attorney, and

Rufus W. Peckham, Counsel for defendant in error.

First. The alleged contract for the sale of land is void for uncertainty in the description of the land contracted about. (2 *R. S.* 135, § 8.)

1. There is nothing certain in the contract, and it refers to nothing *extrinsic* by which the particular land can be ascertained or located. (*Abeel v. Radcliff*, 13 *J. R.* 300.)

2. This is not a case where part of the description may be rejected as false, and the premises be then accurately and sufficiently described. The maxim, *falsa demonstratio non nocet*, has no application. (*Loomis v. Jackson*, 19 *J. R.* 419; *Wen-*

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dell v. The People, 8 *Wend.* 190; *Wigram's Ex. Ev.* 105, § 133; *do.* 54, § 67.)

3. It is not a case of election as to the location of this land, as there is nothing on the face of the contract indicating an intent to give an election to the vendee. (*Cow. and Hill's Notes to Phil. Ev.* 1383.)

4. Nor has there here been any location of the premises, if location could be of any avail. (*Frier v. Jackson*, 8 *J. R.* 495.)

5. It is not a case where the description applies equally to more than one object or subject, where it is unambiguous in its application to each of several subjects. On the north side of this line is four seven-tenth acres; on the south fifty acres. From "six to eight acres" cannot then be made from the north side of this line. (*Wig. Ex. Ev.* 184, 169; 7 *C. & P.* 761; 1 *Cr. & Meeson*, 235; 1 *Paige*, 270.)

6. It is clear that here all the particulars are necessary to identify the thing described, (and then there is no description,) and therefore evidence of an *intent* to embrace a subject matter not answering every part of the description is inadmissible. (*Wendell v. The People*, 8 *Wend.* 189; *per Wadworth, Chan.*)

Second. Can it be pretended that "*the words* of this contract, when all the circumstances of this case are known," define or describe the four seven-tenth acres on the north side of this "easterly" line, as the land agreed to be sold? (*Wig. Ex. Ev.* 98, § 128-9; *do.* 76, § 96.)

The inquiry, after the facts are known, is confined to the "meaning of the *words used*—hence all extrinsic evidence tending to prove not what the party *has expressed*, but what he *intended to express*, is calculated to throw no light on the real matter in dispute." (*Cow. and Hill's Notes*, 1387; *Wig. Ex. Ev.* 116, § 153.)

To define that which is indefinite, "is to make a material addition to the will; once admit that the person or thing intended by the testator, need not be adequately described, and it is impossible to stop short of the conclusion that a mere mark will, in every case, supply the place of a proper description." (*Wig. Ex. Ev.* 121, § 158; *do.* 97, § 126.)

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Third. The declaration in this case is for *damages* for not taking the deed, not for the price of the land, as it states, and as both parties understood. Hence the plaintiff below could recover only six cents, unless he proved damages. For this six cents this court will not reverse the judgment. “*De minimis*,” &c., applies. (*Graham on New Trials*, 307 to 310.)

DECISION.—Judgment affirmed unanimously.

Note.—In a *contract* for the conveyance of real estate, the description of the premises, to which any effect can be given, must be either perfectly certain of itself, or capable of being made so *by a reference* to something extrinsic the contract.

That the parties know the localities, or parcel contracted for, is nothing; the written instrument is alone the only competent evidence of their object and intent.

Not reported.

JUDSON, plaintiff in error, *agt.* HOUGHTON, defendant in error.

Questions discussed.

The *condition* of an *adjournment bond*, given in an action before a justice of the peace, was, “That, if no part of the property of the said defendant, liable to be taken on execution, shall be removed, secreted, assigned, or in any way disposed of, (except for the necessary support of himself and family,) until the said demand of the said plaintiff shall be satisfied, or until the expiration of ten days after the said plaintiff shall be entitled to have an execution issued on the judgment in the said cause, if he shall obtain such judgment.” In an action for a breach of the condition of this bond, where the *surety* alone appeared, the following questions arose:—

1. Whether, on proof of sale by defendant in the original suit of a *load of hay*, it was competent evidence for the defendant in this action to show the purchase by the defendant in the original suit, of flour, fish, and tea, and the support of his family, *unless* he also showed that the *money received for the hay was used for that purpose*, and was *necessary*?

2. Whether it was absolutely necessary to give *direct proof* that the money received for the hay was required for the support of the defendant or his family, or that it was so expended? Whether it might not be *inferred*?

3. Whether, in order to justify the inference that the money was thus applied,

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it was competent to show the number of persons who composed defendant's family, and their reasonable and necessary weekly expenses ?

4. Whether it was a breach of the condition of the bond, by the defendant in the original suit, in having, some months previous to that suit, sold some personal property and took a *mortgage* back for security, which mortgage, *at the time received*, he by *PAROL agreed* to assign to a third person, in consideration that the latter would cancel a mortgage he held on the same property ; but which *assignment was not in fact made until after this adjournment bond was given ?*

5. Whether it was competent to receive evidence of the *parol agreement* to assign the mortgage ?

This was an action of debt upon a justice's court *adjournment bond*. The cause was tried before a justice of the peace of Chenango county. Judson was the plaintiff, and Jehial Houghton and Harvey Houghton were the defendants in the justice's court. The summons was not served on Harvey Houghton, and he did not appear in the suit. The justice rendered a judgment upon the verdict of the jury against Judson for costs. Judson removed the cause into the Chenango common pleas by certiorari ; *both* of the *Houghtons* were named as defendants in the writ of certiorari. The common pleas reversed the judgment of the justice, and gave judgment against Jehial Houghton *alone* for twenty dollars costs.

Jehial Houghton removed the cause into the supreme court by writ of error, and there assigned common errors, and *specially*, that if judgment ought to have been given by the court of common pleas against him, it should have been given against him and Harvey Houghton *jointly*. This *special assignment of errors is not traversed or answered by the joinder in error*.

The bond on which the suit was brought was given to procure an adjournment in an action of assumpsit, in which said Judson was the plaintiff, and said *Harvey Houghton* was the defendant, and bears date Feb. 23, 1843. An execution was issued on the judgment rendered in the suit mentioned in the adjournment bond on the 29th day of July, 1843, and was returned *nulla bona* on the 17th day of August, 1843.

Jehial Houghton pleaded in the justice's court as follows :— First, The general issue. Second, Two special pleas that the said execution was returnable *ninety* days from its date, (which

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was in fact returned in nineteen days,) and that Judson had not *exhausted* his remedy on the execution; and that after it was returned and within the life of it, Harvey Houghton had sufficient property in the county of Chenango to have satisfied it. Third, That Harvey Houghton had not removed, secreted, assigned, or in any way disposed of his property. Jehial Houghton gave notices under the plea of the general issue. On demurrers all of said pleas (except the general issue) were overruled by the justice.

On the trial of the said cause, *Uri Tracy*, a witness sworn on the part of the plaintiff, testified: That he was a justice of the peace of Chenango county in 1842, and says as follows: A suit was commenced before me by summons by Everitt Judson, against Harvey Houghton, and issue was joined on the 27th day of January, 1843. The suit was adjourned by agreement of parties until the 23d day of February, 1843, at which time the cause was again adjourned by Harvey Houghton until the 28th day of April, 1843, and Harvey Houghton gave an adjournment bond, signed by himself and Jehial Houghton, which is hereunto annexed, marked "1." And as appears by my docket, I rendered a judgment in favor of Everitt Judson against Harvey Houghton, on the 28th day of April, 1843, for \$42.44, damages and costs: the damages were \$40.54, and the costs \$1.90. I issued an execution on the judgment on the 29th day of July, 1843, and it was returned on the 17th day of August, 1843, by Ira Willoughby, constable, and his return on it, no property found. The execution handed to the witness, he says: This is the execution which I issued on the judgment. The plaintiff offers the execution in evidence; the defendant, Jehial Houghton, objects on the ground that the execution purports to have been issued on a different judgment than the one entered by justice Tracy against Harvey Houghton. The judgment as entered by the justice is \$42.44, damages and costs, and the execution recites a different judgment, being issued for and commanding the constable to collect the sum of \$42.54. The court sustained the objection, to which decision the plaintiff excepted.

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The docket of justice Tracy, given in evidence, and that part of it which recites the issuing and return of the execution, subject to defendant's exception. Docket states the issuing of the execution to be on the 29th day of July, 1843, and returned by Ira Willoughby, a constable, on the 17th day of August, 1843, no property found.

Witness, *cross-examined*, says: I have never issued but one execution on the judgment. The defendant's counsel here asked the witness if he had ever issued any other execution on the judgment except the one in court; plaintiff's counsel objects, and the court sustained the objection; defendant's counsel excepts.

Thomas Holmes, a witness sworn on the part of the plaintiff, says: I am acquainted with Harvey Houghton; I was acquainted with him in 1843. Plaintiff offers to show by this witness that Harvey Houghton disposed of his personal property liable to execution previous to 29th July, 1843, and also previous to first of June, 1843, and after the bond was given, and before the time for issuing execution. Defendant's counsel objected, on the ground that the plaintiff must first show that a valid execution was issued on the judgment, and constable's return on it: court overruled, and the defendant excepted. Harvey Houghton sold one ton of hay to A. S. Perkins, the last of April, 1843, and he said he got \$10 for it. He drew the hay from Mr. Justice Dickinson. Hay was selling at that time for \$10 per ton. I do not know what he did with the money which he got for the hay.

Plaintiff rests for the present.

Moses J. Ferry, a witness on the part of the defendant, says: I was a partner of Harvey Houghton formerly; our partnership closed about the first of December, 1842. In the winter and spring of 1843, I lived within a mile and a half of Harvey Houghton; he had a wife and two children, which he supported at the time. I rode down to the village on a load of hay with Harvey Houghton, in the spring of 1843; he took the hay over the river. I do not know who bought the hay. I was in Mr. Tuttle's grocery that day, and Harvey Houghton bought some

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flour, fish, and tea. I cannot tell the amount, nor how much he paid for it. Plaintiff objects, unless the defendant can show that the articles were purchased with the money which he got for the hay. Court overruled, and the plaintiff excepted. Witness says, Harvey Houghton kept house, and supported his family from 23d day of February, 1843, to 29th of July, 1843, and I should think it would be worth for necessaries to support his family, at that time, \$1 each a week. The plaintiff objects to evidence of the expense of Harvey Houghton's family, and it is taken subject to said objection.

The witness, *cross-examined*, says: That I do n't know that Harvey Houghton had any personal property liable to execution from 23d February, 1843, to 29th July, 1843. I should think Harvey Houghton got about \$2 worth of flour at Mr. Tuttle's grocery; at the time he got the codfish and tea, he got two or three codfish and less than one pound of tea. Harvey Houghton was not in business from 23d Feb. to 29th July, 1843; he collected some money belonging to him and myself.

The defendants rest.

The plaintiff offers in evidence a personal mortgage executed by Samuel Stiles to Harvey Houghton, a copy of which is hereunto annexed, marked "F." The mortgage was received in evidence subject to the defendant's exceptions. Said mortgage was given to secure the payment of seven hundred dollars, and dated 24th day of October, 1842, and assigned by Harvey Houghton to Jehial Houghton, on the 4th day of April, 1843; a copy of which assignment will be found endorsed on the copy of the said mortgage, marked "F." as aforementioned, and hereunto annexed. The defendant admits the assignment of the said mortgage by Harvey Houghton to Jehial Houghton. The mortgage is payable according to the condition of a certain bond, dated 24th October, 1842; a copy of which is hereunto annexed, marked "G." The bond given in evidence, the execution of it being admitted by the defendant's counsel, subject to defendant's exception.

Samuel Stiles, a witness sworn on the part of the plaintiff, says: The property which I mortgaged to Harvey Houghton

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was worth \$800. The first payment stated in the mortgage, the amount of which was \$428, I was to pay Abel Smith on the 15th day of April, 1843. I did not pay Abel Smith at that time. I paid \$50 in cloth at one time, and in August, 1843, I paid \$50 cash.

Witness, *cross-examined*, says: The property which I mortgaged was in the factory, and it was there when I left, which was in September, 1843.

Uriah Thompson, a witness sworn on the part of the plaintiff, says: I purchased the real estate on which the factory stands, in August, 1843. The plaintiff offers to show by this witness that Jehial Houghton, one of the above defendants, sold the personal property mortgaged by Stiles to Harvey, and assigned by Harvey to him, after the 17th day of August, 1843: defendant objects. Court sustained the objection; plaintiff excepts.

Plaintiff rests.

The defendant offers in evidence a personal mortgage on the same property, specified in the mortgage executed by Samuel Stiles to Harvey Houghton, given by Harvey Houghton to Jehial Houghton, and dated on the 12th day of July, 1842, for \$416.92, payable on the 12th day of July, 1843. The said mortgage is hereunto annexed, marked "H." The plaintiff admits the execution of the said mortgage, but objects to have it read in evidence. Mortgage read in evidence, subject to the plaintiff's exception.

Samuel Stiles, recalled by the defendant, Jehial Houghton, says: That on the 24th day of October, 1842, he purchased of Harvey Houghton the personal property, and gave him a personal mortgage to secure the payment of seven hundred dollars; that Jehial Houghton was present, and gave a writing giving up his claim on the property, by virtue of his personal mortgage, dated on the 12th day of July, 1842. The defendant offers to show by this witness, that on the 24th day of October, 1842, and at the time Jehial Houghton gave up his claim by virtue of his mortgage, that there was an agreement between him and Harvey Houghton, that he was to give up his mortgage on the

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property, in order to enable Harvey Houghton to sell the property to Samuel Stiles; and that Harvey Houghton then agreed to assign to Jehial Houghton the personal mortgage which Samuel Stiles was about to give him to secure Jehial Houghton what he owed him. Plaintiff objects. Court overruled the objection. Plaintiff excepted. The witness says: When I bought the property of Harvey Houghton, Jehial Houghton had a personal mortgage on it, and I did not like to purchase it while his mortgage was on it; and Harvey Houghton wanted Jehial Houghton to give up his mortgage, so that he could sell the property to me, as I did not want to purchase it with that incumbrance on it; and Harvey told Jehial that if he would cancel his mortgage on the property, he would assign the mortgage which I was to give to him to Jehial, to secure him what he owed him; and it was talked over between them, that Harvey Houghton could assign to Jehial Houghton the mortgage which I was to give to Harvey Houghton. I do n't know that I can tell the exact words of the conversation. Harvey Houghton said if Jehial would give up his mortgage or claim on the property, he could arrange it so as to secure him.

Witness, *cross-examined*, says: Harvey Houghton said he and Jehial could arrange the security, and Jehial Houghton said, if he gave up his mortgage, Harvey could secure him by assigning to him my mortgage. I cannot tell why Harvey Houghton did not assign the mortgage to Jehial Houghton on that day; there was no time set when Harvey Houghton was to assign the mortgage to Jehial Houghton, as I recollect.

Moses J. Ferry recalled by the defendant, says: There has been no change of the property in the factory. On the 24th day of October, 1842, I was present when Samuel Stiles executed the mortgage to Harvey Houghton. There was something said about change of security between Harvey Houghton and Jehial Houghton. I cannot tell the conversation; there was something said about Harvey's assigning the Stiles mortgage to Jehial Houghton, but I cannot relate what was said.

This is all the testimony given on the trial.

The supreme court, at May term, 1846, on reversing the

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judgment of the common pleas, delivered the following opinion :—

BEARDSLEY, J. The special pleas were adjudged to be bad on demurrer, but as the defendant had a verdict and judgment in his favor on the general issue, which in terms denied “all the statements and allegations contained in the said plaintiff’s declaration,” it is unnecessary for any purpose to examine the special pleas and pass upon their sufficiency. The issue tried was that formed by a general denial of the matters alleged in the declaration; and the whole case was thus brought out. The special pleas were not before the jury, and may be regarded as out of the case.

Two breaches of the condition of the bond were attempted to be established by the plaintiff; one by the sale by H. Houghton of a ton of hay about the close of April, 1843, and the other by the assignment of the mortgage to J. Houghton, on the 4th of that month.

The sale of the hay seems to have been conceded, but evidence was given to show that it had been disposed of for the necessary support of H. H. and his family. This was fairly meeting that part of the case; and the evidence adduced for the purpose was competent and proper. It was not absolutely necessary to give direct proof that the money received for the hay was required for the support of H. H., or his family, or that it was so expended. These might be inferred; and in order to justify the inference it was competent to show the number of persons who composed the family of H. H., and their reasonable and necessary weekly expenses; that he was then in a great degree destitute of property and not engaged in business; and that on the day the hay was sold he made a purchase of flour, fish, and tea.

Nor do I see any thing illegal in that part of the trial which had especial reference to the assignment of the mortgage to J. Houghton. It is competent to show that it was agreed on the 24th Oct. 1842, when Stiles gave his mortgage, that if J. H. would cancel the mortgage then held by him, H. H. would assign the mortgage about to be given by Stiles as security to

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J. H., for the amount then due on the mortgage to be cancelled, and that upon this agrèement the former mortgage was cancelled. If in truth such an agreement was made (and that was for the jury to determine) this mortgage given by Stiles to the extent of the indebtedness on the cancelled mortgage belonged as soon as executed in equity and conscience to J. H.; and although it was not in form assigned until the next April, the delay could not destroy the right of J. H., nor make the transfer in April a breach of the condition of this bond. It was only doing what H. H. was bound in law, equity, and honor to do, and should have been done before, and was not removing, secreting, assigning, or in any way disposing of the "property" of H. H. To the extent of the assignment, the mortgage was in equity the *property* of J. H. before the assignment was made; and the formal execution of that was in no respect illegal or improper.

The common pleas appear to have regarded the evidence of what passed between the two Houghtons on the 24th of October as evidence of an irrelevant conversation between them, and so not admissible as evidence against the plaintiff. But it was more than a mere conversation which was stated by the witnesses—was evidence to establish an agreement between them, made to be sure by words, (and in that sense it was a conversation,) but still no more open to objection on that ground, than evidence of any other verbal contract, which it becomes necessary to prove on a trial between third parties. The evidence for this purpose was admissible and it was correct to receive it.

On the part of the plaintiff, it was offered to prove that on the 17th of August, 1843, J. H. sold the property mortgaged to one Thompson, which offer was rejected by the justice. This was held to be erroneous by the common pleas. I confess that I do not see how this was a material fact. H. H. had previously assigned the mortgage to J. H., to secure the payment of \$228, and whatever may have been done in virtue of this assignment, cannot be regarded as the act of the assignor, nor can it amount to a breach of the condition of this bond by

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him, unless he is shown to have been a party to it in some other way than by the mere execution of the assignment.

The only grounds taken by the counsel for the defendant in error, were those stated in the record of the common pleas, and on which the judgment of the justice was reversed. I think neither of these can be sustained, and the judgment of the common pleas should be reversed.

Judgment reversed.

Judson, the plaintiff, brought a writ of error, and removed the judgment into this court.

Roswell Judson, Attorney and
Rufus W. Peckham, Counsel, for plaintiff in error.

First. Proof of the sale of the ton of hay, by H. Houghton, was sufficient to sustain plaintiff's action. To do away with this proof, it was not competent for the defendant, Jehial Houghton, to show the purchase of flour, fish, and tea, and the support of H. Houghton's family, unless he also showed the money got for the hay was used for that purpose, and was *necessary*. One claiming property to be exempt must show affirmatively and certainly that it is in *fact necessary*. (*Van Sickler v. Jacobs*, 14 J. R. 434; *Bowne v. Witt*, 19 Wend. 475.) The claimant holds the affirmative, and must bring himself clearly within the statute under which he claims, it being a personal privilege. It does not appear but that H. Houghton had any amount of money, other than the avails of the hay, for the support of himself and family. He had collected money due himself and Ferry—had been doing a good deal of factory business—held a bond and mortgage against Stiles, of a large amount, upon which he received in November, 1842, a \$50 note, and in August, 1843, \$50 in cash. (See *Error Book*, p. 30, fol. 102.) Though he may not have had any property liable to execution, other than the hay and his interest in the mortgaged property, it does not preclude the idea but that he was a wealthy man, his property consisting of bonds and mortgages, notes and accounts.

Second. On page 13, fol. 38, of *Error Book*, it appears the

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plaintiff offered to prove "that Jehial Houghton sold the property mortgaged by Stiles to Harvey Houghton, and assigned by Harvey Houghton to him," &c., which proof was not admitted by the justice. Stiles swears the property was worth \$800. Whether Jehial Houghton sold this property as assignee of Harvey Houghton, under the mortgage, or as agent of Harvey Houghton, (the assignment by Harvey Houghton to Jehial Houghton being a sham,) was a proper question to be left to the jury, and the proof offered was proper to raise that question.

Again, the proof offered was proper, to show that Harvey Houghton had *secreted* his property by a pretended transfer by said assignment. The Stiles mortgage was given as collateral security to a bond and mortgage, and conditioned to pay as in said bond specified. The Stiles mortgage was assigned to secure \$228, to be paid out of the second payment of said mortgage, being the second payment of said bond. The first payment of said mortgage was about \$428, on the 15th April, 1843. This payment was not made, and the mortgage became forfeit, and the title to the property became vested in Harvey Houghton, or his assignee. If the assignment was in good faith, and for a valuable consideration, (none was proven,) why did Harvey Houghton receive \$50 on the bond, on the 8th Aug. 1843, being on the first payment in the Stiles mortgage? (See *Error Book*, page 30, fol. 102.) Was not the legal title, a leviable interest in that property, in Harvey Houghton? (*Ferguson v. Lee*, 9 *Wend.* 258.) And was not that leviable interest *secreted*, and the constable with the execution kept at bay by the sham assignment? And to save appearances, did not Jehial Houghton go on and sell the property? What did Jehial Houghton do with the avails? Certainly he did not pay this plaintiff's debt or execution against Harvey Houghton out of them.

Can it be, the legislature intended an adjournment bond should operate as a co-instrument to help out chattel mortgages more effectively with their great frauds upon creditors? or was it intended the bond should serve to keep the creditor in as favorable circumstances to collect his debt as when the bond

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was given? Doubtless, the latter. But has it served that purpose in this case?

Third. But it is said by the defendant that there was an agreement made by and between himself and Harvey Houghton, on the 24th day of October, 1842, that Harvey Houghton should assign to the defendant, Jehial Houghton, the Stiles mortgage. In admitting proof of this the plaintiff says the justice erred.

1. No consideration for that agreement was proven. Jehial Houghton sought to claim under a personal mortgage, and was bound to show it was given for a good and valuable consideration and in good faith, which he did not do. *Prima facie*, his mortgage was a fraud as to the plaintiff, and ought not to have been read to the jury. (*Hanford v. Acker*, 4 *Hill*, 272, 295; *Smith & Hoe v. Acker*, 23 *Wend.* 653; 2 *R. S.*, p. 70, 2 *ed.*)

2. It was a mere conversation between the defendant, Jehial Houghton, and a third person, and ought not to have been received in evidence against the plaintiff. No equity or good faith could arise in favor of defendant, Jehial Houghton; for, so far as it appeared, his mortgage was a *fraud in law*, (2 *R. S.* p. 70, § 5, 2 *ed.*) and the exception to its being read in evidence was well taken. (3 *Hill*, 398.)

Ransom Balcom, Attorney, and

N. Hill, jr., Counsel, for defendant in error.

First. The common pleas erred in giving judgment for costs against Jehial Houghton *alone*. If a reversal of the justice's judgment was proper, (which is denied,) the judgment for costs should have been given *in form* against *both* Jehial Houghton and Harvey Houghton. (2 *R. S.* 2d. *ed.* p. 299, § 1; *Pardee et al. v. Haynes et al.*, 10 *Wendell*, 630.)

"This is not a mere formal defect which may be overlooked on a writ of error. It is matter of substance. It changes the form of the execution." (Per BRONSON, Justice, *Nelson v. Bostwick*, 5 *Hill*, 41.)

This error is specially assigned and not denied by the joinder in error.

Second. The ruling of the justice, excluding the execution

issued by justice Tracy, was correct, because it was issued upon a different judgment from the one entered in the docket of the justice, and for the further reason there was no evidence that the variance happened by *mistake*. But even admitting (for argument's sake) the exclusion of the execution to have been erroneous, the *error did not affect the merits*, and was cured by the introduction of justice Tracy's docket, which showed the issuing of an execution and its return *nulla bona*. The docket was *conclusive evidence*. (7 *Wendell*, 103; 13 *Johns. R.* 184; 2 *Cow. Tr.* 2d ed. 926, 1022 and 1023; 2 *R. S.* 2d ed. 195 and 196, §§ 243 and 245; 2 *R. S.* 2d ed. 185, § 181; 6 *Hill*, 42.)

This point was not made by Judson's counsel, either in the common pleas or in the supreme court. It should be deemed waived. (*Campbell v. Stokes*, 2 *Wendell*, 137.)

Third. The justice properly overruled the objections to the proof of the expense of supporting Harvey Houghton's family, and of his purchase of flour, fish, and tea, &c. Harvey Houghton had the right, according to the condition of the adjournment bond, to dispose of his property "for the necessary support of himself and family." He was not obliged to have a witness with him when he sold his hay, to see whether he received his pay in bills or specie, and keep such witness with him to see that he paid the identical bills or specie for the necessities he purchased. And in case he sold no more property than enough "for the necessary support of himself and family," the presumption is that the proceeds of the sale or sales were properly applied for such support. (See 1 *Vol. Cowen and Hill's notes*, p. 304. See also the reasoning of justice BEARDSLEY in *Error Book*, pp. 37, 38.)

The other evidence showing the condition and number of Harvey Houghton's family was competent and proper to prove the necessity for his making what disposition he did of his property.

Fourth. The offer to prove by the witness Thompson, that Jehial Houghton sold the property mortgaged by Stiles to Harvey Houghton, and assigned by Harvey to Jehial, was properly overruled. For at the time it was alleged the sale was made, the execution had been issued more than *ten days*,

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and had actually been *returned* to the justice who issued it. A sale after the 17th day of August, 1843, of the property of either Harvey or Jehial by either one or by both of them, was no violation of the condition of the adjournment bond. (See the reasoning of justice BEARDSLEY upon this point in *Error Book*, p. 39.)

Fifth. The objections to Jehial Houghton giving in evidence the personal mortgage executed to him by Harvey Houghton, dated July 12, 1842, and to the evidence of the agreement proved by the witness Stiles, were properly overruled by the justice. The mortgage and agreement proved by Stiles were good and legal evidence of a valuable consideration for the assignment of the Stiles mortgage by Harvey Houghton to Jehial Houghton.

It is also insisted with confidence that the testimony of Stiles established a valid assignment of the mortgage on the 24th day of October, 1842, which was before the adjournment bond was executed. "A chose in action may be assigned by parol without writing." (*Briggs v. Dorr*, 19 *Johns. R.* 95.)

As soon as the *consideration* for the assignment passed from Harvey Houghton to Jehial Houghton, the mortgage to the extent of the consideration or indebtedness was the *property* of Jehial Houghton, and the *date* of the assignment upon the mortgage is wholly immaterial, and the written assignment should be regarded as made when the consideration passed.

A court of equity would have compelled Harvey Houghton to execute the assignment of the mortgage to Jehial Houghton, if he had refused to do it, and his voluntarily doing it does not make the act unlawful, and furnishes no cause of action upon the bond. (See justice BEARDSLEY's reasoning upon the point, pp. 38, 39.)

Sixth. If it was admitted that the assignment of the Stiles mortgage by H. Houghton to J. Houghton was not effectual and valid until the *written* assignment was executed on the 4th day of April, 1843, such assignment was no breach of the condition of the adjournment bond for several reasons. First, because no payment was then *due* on the mortgage. Second,

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because the mortgage was a chose in action and not "liable to be taken on execution." Thirdly, because the *first* payment mentioned in the mortgage *was not assigned*, and was to be made to *Abel Smith*. And Smith could have sustained an action in *his own name* for its recovery. (3 *Johns. Ch. R.* 254; 2 *Denio's R.* 45.)

Fourthly, because the payments *assigned* did not any of them become due until after the execution was *returned*. Fifthly, because the neglect to make the *first payment*, mentioned in the mortgage, when it became due did not render the mortgaged property liable to be taken on execution against the mortgagee: *all the payments* must be due before mortgaged property can be taken on execution against the mortgagee. Sixthly, because the presumption was, at the time the assignment was made, that Stiles would make the first payment to Abel Smith, when it became due; and it is very clear, if he had made that payment to Smith, when it became due, that such act would not have been a breach of the condition of the adjournment bond.

Seventh. The demurrers in the justice's court to the 2d, 3d, and 4th pleas of the defendant *admitted* the allegations and averments which they contain; and it is submitted that the facts set forth in said pleas are a *bar* to any recovery upon the adjournment bond. Judson should have *exhausted* his remedy upon his execution against Harvey Houghton before suing upon the bond. The execution was returnable *ninety* days from its date, and it was returned within *nineteen* days from its date. "Until the return day, however, it would be the duty of the sheriff to seize and sell any property of the defendant's which could be found in his bailiwick. The execution cannot therefore be considered legally returned unsatisfied, until *after the return day*." (Per WALWORTH, chancellor, *Cassidy v. Meacham*, 3 *Paige's Reps.* 312.)

Lastly. Justice was done by the jury in the justice's court, and the judgment of the supreme court affirming the judgment of the justice is founded in law, equity, and good sense, and it is insisted that the same should be *affirmed*.

DECISION—judgment affirmed unanimously.

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GRAY, Judge.—This action is prosecuting to recover damages for the breach of a bond executed by the defendant with one Harvey Houghton to the plaintiff, to procure the adjournment of a cause prosecuted by the plaintiff in a justice's court against said Harvey Houghton. The bond is the joint bond of the defendant and H. Houghton, and bears date the 23d Feb. 1843. The condition is, that until the payment by Harvey Houghton of any judgment which in the suit in the justice's court might be rendered, in favor of the plaintiff, or until ten days after the day that the plaintiff should become entitled to execution on such judgment, the said Harvey Houghton would not remove, secrete, assign, or in anywise dispose of any of his property liable to execution, except such as might be necessary for the support of himself and family.

The case shows that a judgment was subsequently, in the month of April, 1843, rendered in said cause in favor of the plaintiff, and that an execution was duly issued thereon in July, and returned *nulla bona* in August, 1843, and that intermediate the date of the bond and the return of the execution unsatisfied, the said Harvey Houghton sold hay belonging to him, and made also an assignment of a chattel mortgage of \$1,100 which he held against one Samuel Stiles. The chattel mortgage of \$1,100 was assigned to the defendant, Jehial Houghton, on the 4th day of April, 1843.

The breaches assigned by the plaintiff were the sale of the hay and the assignment of said chattel mortgage by Harvey Houghton.

The evidence shows that Harvey Houghton had a family for whom he provided; and that on the same day that he sold the hay, which was one ton only, at \$10, he purchased about \$2 worth of flour, and also some codfish and tea, at a grocery where he sold the hay. The cause was tried by a jury, and to them was submitted the question whether the hay was necessary for the support of Harvey Houghton and his family, and whether the avails were so applied, and the jury found a verdict in favor of Houghton.

In relation to the assignment of the \$1,100 mortgage, it was proved that the same was given to secure the purchase money

for the property covered by the mortgage, which was, on the date of the mortgage, sold by Harvey Houghton to said Stiles. This mortgage was given, and bears date the 27th Oct. 1842. On the 12th July, 1842, Harvey Houghton, to secure a debt owing from him to Jehial Houghton, had executed a chattel mortgage on this same property for about \$417.

To enable Harvey Houghton to effect a sale of the property to Stiles, it was arranged, as was proved by Stiles, that the mortgage of Jehial Houghton for \$417, of the date of July 12th, 1842, should be released, and was released to Harvey Houghton, and Harvey Houghton, to secure the debt owing by him to Jehial Houghton, agreed to assign to Jehial the mortgage which he was about to take, and which he did then take from Stiles.

This was the express agreement between the Houghtons, and the condition upon which Jehial relinquished his mortgage lien upon the goods to Harvey; and it was by virtue of this agreement, and in consummation of it, that Harvey Houghton, on the 4th day of April, 1843, assigned his mortgage against Stiles to Jehial Houghton. Now, although this assignment was in fact not made until the 4th of April, 1843, which was subsequent to the execution of this adjournment bond to the plaintiff, yet being in fulfilment of a previously existing binding contract, by relation, it took effect, and may be deemed to have been executed on the 24th day of Oct. 1842, the date of the agreement upon which it is founded.

The execution of this assignment was a discharge only of a prior binding obligation resting upon Harvey Houghton. But without this assignment the mortgage could not have been reached by the plaintiff's execution, and by it the plaintiff's right has not been interfered with, or in anywise affected.

Without an assignment Jehial Houghton had such an equitable claim and preference upon the mortgage as to have enabled him to enforce it in chancery, and to have defeated any right or interest which the plaintiff might have acquired by a levy on the execution, if the property of Harvey Houghton was, under any circumstances, liable to be taken on execution.

By the arrangement between the Houghtons, in October, 1842,

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the equitable property of the Stiles mortgage, to the extent of the claim then relinquished by Jehial to Harvey Houghton, was in Jehial Houghton, and to that extent, irrespective of the assignment, Jehial Houghton had a preference, and could have enforced the assignment and payment of the mortgage to himself.

The assignment cannot, therefore, in this view be regarded as an infringement of the plaintiff's rights, and consequently not a violation of the bond given to him by the defendant.

But independently of this previously existing obligation to assign, suppose an assignment of this mortgage had been made by Harvey Houghton to Jehial, or to any other person, would such an assignment have operated as a breach of the bond, and enabled the plaintiff to take advantage of it by an action at law thereon? I apprehend not. The condition of the bond is, that Harvey Houghton should not assign, or dispose of, any property which is "*liable to be taken on execution.*"

It is settled that before forfeiture of the mortgage the interest of the mortgagee, in personal property mortgaged, is not the subject of levy and sale on execution. (9 *Wend.* 258, *Ferguson v. Lee.*) There was no forfeiture of the mortgage in this case. The mortgage was not wholly due until the 15th Oct. 1844.

From endorsements upon the mortgage it appears that the prior instalments were paid as provided for. At all events, there is no evidence that the mortgage had become forfeited. An assignment in this latter view, also, would not have amounted to a breach of the bond.

The judgment of the supreme court must be affirmed, with costs to the defendant.

NOTE.—In an action for a breach of the conditions of an *adjournment bond*, given on a trial before a justice of the peace.

Held, on proving that the principal had sold property liable to execution pending the adjournment, that the *surety* on the bond (the only defendant who appeared) might show, that the property had been disposed of for the *necessary support of the principal and his family*.

Also *held*, that it was not absolutely necessary to give *direct proof* that the money received for the property sold was required for the support of the principal or his family, or that it was so expended. These might be inferred; and in order to justify the inference, it was competent to show the number of persons

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who composed the family of the principal, and their reasonable and necessary weekly expenses.

Held, also, on proving that the principal was the owner and holder of a mortgage of personal property, which he had assigned to the surety during the existence of the bond; that it was competent for the surety, the defendant in this suit, to show that the principal had made a *verbal contract*, for a valuable consideration, to assign the mortgage some months previous to executing the adjournment bond; that the mortgage thus assigned was, in equity, *the property* of the assignee before the assignment was made, and the formal execution of it was in no respect illegal or improper.

The execution of this assignment being a discharge only of a prior binding obligation, it took effect by relation from the time of the agreement to assign. But without the assignment the mortgagee had such an equitable claim and preference upon the mortgage as to have enabled him to enforce it in chancery, over any right or interest the plaintiff in the execution might have acquired by a levy.

Besides, it is settled that before forfeiture of a mortgage, the interest of the mortgagee in personal property mortgaged is not the subject of levy and sale on execution. There being no forfeiture of the mortgage in this case, there was no breach of the condition of the bond by the assignment.

Not reported.

HYMANN, plaintiff in error *agt.* COOK AND OTHERS, defendants
in error.

Questions discussed.

1. Whether, where a matter of *fact*, pleaded by defendants in error, in the supreme court, in bar of the plaintiff's right to maintain his writ of error, being found for the plaintiff, the defendants in error, notwithstanding there was no joinder in error, had a right to be heard upon the whole matter on the record?

2. Whether *replevin* for wrongful *taking* would lie, where the property, nine casks horn-tips, purchased and paid for by plaintiff, with a request by defendants to take them away, which was objected to by plaintiff until counted, and during their continuance in the store of defendants, while plaintiff was counting the same, he was forbidden by defendants from taking them away? In other words, was the evidence in the case sufficient to sustain the action of replevin in the *cepit*?

3. Whether, in a non-suit in replevin, on the ground that the proof did not show a wrongful *taking*, but at most only a wrongful detention; and the defendants having *once elected* to take an *assessment of damages* under the statute, they could afterward, and before the jury were discharged, waive the assessment, and take judgment for a *return of the property*?

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This was an action of *replevin*, brought by Hymann against Cook, Arms & Perkins, in the New-York common pleas. The declaration "complaints that the said defendants heretofore, and before the commencement of this suit, to wit, on the tenth day of August, one thousand eight hundred and thirty-nine, at the city and county of New-York aforesaid, and within the jurisdiction of this court, in a certain house or store, to wit, at No. 138 Pearl-street, in the city of New-York, took nine casks horn-tips, containing a large quantity, to wit, 32,500 horn-tips, the property of the said plaintiff, of great value, to wit, of the value of five hundred dollars, and the said defendants unjustly detained the same, wherefore the said plaintiff says he is injured and has sustained damages of two hundred and fifty dollars."

To this the defendants pleaded, 1st. The general issue; 2nd. A special plea that the property was in the said defendants, Levi Cook, Charles Arms, and one Moses Cook; 3rd. A special plea that the property was in the said Levi Cook and Charles Arms; and 4th. A special plea that the property was in the said defendants.

The cause was tried before his Hon. WILLIAM INGLIS, associate judge of the New-York common pleas, on the 10th day of April, 1840. The plaintiff introduced the following testimony :

Hymann' Jacob being duly sworn, *de bene esse*, as a witness on the part of the plaintiff in this cause, answers as follows. He says he expects to leave for Connecticut in a day or two, to return in about two months.

Ques. Do you know Samuel Hymann, plaintiff in this cause?

Ans. Yes, sir.

Q. Do you know the defendants, Cook, Arms, and Perkins, or either, and which of them?

A. Yes, sir. I saw them twice.

Q. When and where did you see them?

A. I saw them once on a Saturday, and once on a Tuesday, in their store in Pearl-street—I don't know the number—between Coenties Slip and Wall-street; it was about five months ago.

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Q. What business did you see them about?

A. When we first bought the goods, I went there to count them. Bought horn-tips. My father went round to buy some goods to send to Germany. He could not get any, and we went in there, and they said they had some; he could not agree about the price; he said he'd go home, and get back in about an hour's time. I went along with him, and wanted to see what kind of goods they were; we bought them, and gave them \$50 on account.

Q. Did the defendants, or either of them, give you any receipt or bill of sale for the goods bought?

A. They gave us a paper [the paper was produced] marked A, is the paper they gave us.

Q. What goods was it you bought?

A. Horn-tips.

Q. Who did you buy them for?

A. Samuel Hymann, my cousin.

Q. Where was Samuel Hymann at the time?

A. In the country; I don't know what part.

Q. What did you do next, after they had given you this paper?

A. We told them we would come back next week, but did not tell them what day.

Q. Did you ever see the horn-tips?

A. Yes, sir, I saw them; first saw them when we bought them; there were nine casks; they were in the lowest part of the store.

Q. When did you go to Levi Cook & Co.'s store next?

A. On the Tuesday next after the Saturday just spoken of.

Q. What was your object in going to their store?

A. We bought three casks—to count the tips and take them away.

Q. Was your father with you?

A. No, sir; he was there with me some part of the day.

Q. Did you and your father count the tips?

A. Yes, part of them.

Q. What part of the store were they in on Tuesday?

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A. In the same part of the store in which they were bought of them.

Q. Did any one in the store tell you to count them?

A. Yes, sir; they said I should count them and try to take them away as soon as I could, as they had no room for them.

Q. Why did you only count part of the tips?

A. There were some good ones, and there were some short. My father and myself went up and told them there were 1,800 short. We went down again, and commenced counting the bad ones. About one hour's time after that, one of the clerks came down and asked my father what kind of money he had given him. My father told him it was gold, silver, and bills. He (the clerk) said he had made a mistake of \$100. He would not let us count them any further.

Cross-examined by Mr. O'Connor.

Q. What is your father's name?

A. Moses Jacob Polander.

Q. What is his business?

A. He keeps a stand in Chatham Square, near Mr. Brown's house, where he sells pins, needles, and such small things.

Q. Who was it in Germany to whom he would send things?

A. I don't know.

Q. Was it horn-tips he wished to purchase to send to Germany?

A. Yes, sir, horn-tips.

Q. What is Samuel Hymann's business?

A. He peddles about the country.

Q. In what degree is he related to you?

A. He is son of my mother's brother.

Q. How long before this purchase had you seen him for the last time?

A. About two months.

Q. How soon after the purchase did you next see him?

A. About two months.

Q. Who did you speak to at the store of Levi Cook & Co. when you made the purchase?

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A. One of the clerks. We made the purchase from one of the clerks.

Q. Do you know his name?

A. No, sir.

Q. Did you see this bill written up, and the receipt at the foot of it signed?

A. Yes, sir.

Q. Who wrote and signed the bill and receipt?

A. The same clerk that we bought the horn-tips from.

Q. Did you or your father speak to any one else in the store about the goods at the time the goods were purchased and the bill and receipt given?

A. No, sir.

Q. Did you go there on Tuesday with your father?

A. No. I went first alone, and asked the same clerk if I could get at the casks, to count the tips and take them away.

Q. How did you set about counting them?

A. We emptied the casks upon the floor, counted all the tips back into it, and then did the same with the next cask, and so on.

Q. How many casks did you empty and count in this way?

A. Four or five; we counted all the good ones. I believe there were six casks of good ones, and three casks of bad ones; we bought them as such.

Q. Who was the clerk who came down and spoke to you while you were counting, as you have said?

A. The one we bought them from.

Q. When you were first there, and when you bought the goods, did your father tell the clerk what his name was?

A. No, sir. I did not hear him. [After reflection, the witness says "yes," he did tell him; he told the clerk his name was Moses Jacob Polander. This was when the clerk was making out the bill.]

Q. Did the clerk put your father's name in the bill?

A. I can't tell you. I did not see him.

Q. Can you read?

A. No, sir.

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Q. Do you know whose name was put in the bill?

A. No, sir.

Q. When the clerk asked your father his name, for the purpose of making out the bill, what did your father say?

A. My father said Samuel Hymann.

Q. Can your father read?

A. No, sir.

Q. Did you ever see Levi Cook?

A. Yes, sir; I saw him on that Tuesday for the first and last time.

Q. Did you ever see Charles Arms?

A. I don't think I ever did. I don't know who he is. It is likely I did see him.

Q. Do you know the gentleman now present?

A. Yes, I think I have seen him before, but I don't know where; and I believe, if I did see him, I saw him in the store there.

Q. After the clerk spoke to your father about the money being short, did he ask your father to pay up the difference?

[Objected to.]

A. He did not say to make up the difference; he asked us to look in the receipt and see whether we gave him \$260 or \$160, and asked my father to show the receipt, if he had it there; my father replied that he had it not there; he looked for it, and found that he had it not there.

Q. After this, did your father leave immediately?

A. Yes, sir; he said it was no use to count any further, and we left immediately.

Q. Was it the casks or the tips of which six were said to belong to another person?

A. It was the casks, not the contents.

[Direct resumed.]

Q. Where did you see Samuel the last time before the purchase of the horn-tips?

A. In New-York.

Q. Where did you see him after the purchase?

A. In New-York.

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[In answer to a question from defendant's counsel.]

Q. You said that the clerk asked your father his name, for the purpose of making out the bill, what did your father say?

A. That my father said Samuel Hymann.

Q. Do you mean that your father said that your father's own name was Samuel Hymann?

[Objected to as leading.]

A. No, sir; he meant that he bought the goods for him.

Sworn to before me this 27th day of January, 1840. EDMUND S. DERRY, <i>Com'r of Deeds.</i>	(Signed)	his HYMANN & JACOBS. mark.
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We consent that this deposition be read on the trial of this cause with the like effect as if it had been taken *de bene esse*, pursuant to the statute, necessity of filing being waived. New-York, January 27, 1840.

E. S. DERRY, *for Def't.*

P. J. JOACHIMSSSEN, *for Pl'ff.*

The counsel for the plaintiff then read in evidence to the court and jury a bill of sale in the words following, to wit:

New-York, August 3, 1839.

MR. SAMUEL HYMANN,

Bought of LEVI, Cook & Co.,
 Manufacturers of every description of Combs, and importers
 of English, French, and German Fancy Goods, No. 138
 Pearl-street and 104 Water-street,

9 casks horn-tips	\$260
Received on account	\$50

LEVI COOK & Co.

G. PERKINS.

Which is the same bill or paper referred to by the witness in his deposition.

On further cross-examination the witness identified the person of defendant Perkins then in court. The counsel for plain-

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tiff then further called as a witness, on the part of the plaintiff, *Moses Jacob Polander*, who, being duly sworn, testified that he knew the plaintiff, who is the son of witness's brother-in-law. Has traded with the defendants, *Levi Cook & Co.*, for plaintiff, in once buying horn-tips; this was about six or seven months ago. Witness made the bargain, and was to pay \$260 for them. Paid for them at one time \$50, and the balance, \$210, at another time. When he paid the last mentioned instalment, the clerks counted the money, and then said it was \$10 short. Witness then paid them \$10. There was also a deficiency on two sovereigns, which witness also paid: the clerk (*Perkins*) then gave him a receipt, and told him he should take away the goods. Witness replied that he could not take them away until he had counted them. Witness and his son (the witness *Jacob*) went down to defendant's store to count them; was there all day Tuesday, and found, on partly counting them, that there were 1,800 less tips of one kind than the number agreed to be sold to him. This was some time in the afternoon, and witness and son went up and told the clerk so, and returned to count those of the other kind; while counting these, the clerk who gave the receipt came to them and asked him what kind of money he had given to him—whether he had the receipt with him. The clerk said he had not paid him full \$260, but only \$160. He said we must stop counting, that he would not allow us to take away the tips. This is the receipt: witness identified a paper which was read in evidence, and is as follows:

Received, New-York, August 5, 1839, of Mr. Samuel Hymann, two hundred and ten dollars, in full for bill tips.

\$210
50 R. C.
—
\$260

L. COOK & Co.
PERKINS.

The casks had been pointed out to witness, and he had been requested to take the tips away on the day previous. Afterward and while counting them, the defendants would not let him take away the tips. He did not get the tips until replevied.

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The plaintiff's counsel here rested his case. The defendants' counsel moved for a non-suit, on the ground that the declaration was for a wrongful taking only, and not for a wrongful detention, and that the evidence did not show a wrongful taking. The court decided that there was no evidence of a wrongful taking, but at most only of a wrongful detention of the goods, and ordered a non-suit to be entered,—to which decision the counsel for the plaintiff, on the behalf of the plaintiff, then and there excepted.

A non-suit was then ordered, and the defendants' counsel stated that he would take an assessment of damages under the statute. The court then took a recess. On the opening of the court, the counsel for the defendants stated to the court that he would waive the assessment of damages, and take a judgment *de retorno habendo*. The counsel for the plaintiff objected on the ground that the defendants had elected an assessment of damages, that the jury had remained empaneled, and that the defendants had thereby waived and precluded themselves from such judgment. The court overruled the objection. The plaintiff's counsel excepted to the decision, and insisted that the defendants were bound to take a judgment for damages which were to be assessed by the jury then empaneled. The court noted the exception, and decided that the defendants were entitled to a judgment of return, and ordered the jury to assess the value of the property. The plaintiff's counsel excepted. The jury, under the direction of the court, assessed the value of the property replevied at two hundred and sixty dollars.

The plaintiff brought a writ of error to the supreme court, and assigned errors generally, and specially as to judgment of a return of the property.

The defendants pleaded specially that the writ of error was not brought within two years after the rendition of the judgment.

The plaintiff replied, that on the day and year of the rendition of the judgment, he was an infant, of the age of nineteen years and three months only, and that he brought his writ of error

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within two years next after he arrived at the age of twenty-one years.

The defendants rejoined to the replication denying the infancy of the plaintiff, and concluded to the country, &c.

The issue of fact thus joined was tried before the Hon. JOHN W. EDMONDS, circuit judge, and a jury, on the 7th January, 1845, who found that the plaintiff was an infant on the day of the rendition of the judgment, and that he brought his writ of error within two years after arriving at the age of twenty-one years.

At the February special term, 1846, A. TABER, for the plaintiff in error, pursuant to notice, upon the *trial record*, consisting of the papers which would make the usual error book, and the *postea* and circuit minutes, moved for a rule reversing the judgment of the common pleas, and alleged that it was a matter of course.

The motion was opposed by N. HILL, Jr., for defendants in error.

Upon that motion, BRONSON, Ch. J., delivered an opinion, (*Reported 2 Denio, 201*), and *held*, that the finding of the issue of fact in favor of the plaintiff in error, proved the plaintiff in error was not barred of his writ of error. But it did not prove that there was any error in the judgment. "The most that could be said of the matter was, that by pleading in bar the defendants had impliedly admitted that there was error in the judgment. But although the parties might conclude themselves by admissions, they could not bind the court. The defendants might confess error in fact, and the court would act upon it; but it was not so where they confessed error in law. There the court would judge for itself." After citing authorities to show that the court must look into the record, the judge concluded as follows: "We must look into this record just as we should have done had there been a joinder in error, instead of a plea in bar. (*See Acker v. Ledyard, 1 Denio, 677.*) The proper course will be for the plaintiff to make up error books and place the cause on the calendar for argument. Either party can notice it. And should a like case arise in

future, the same course must be pursued, instead of making a non-enumerated motion, as has been done in this instance.”

In October term, 1846, the supreme court affirmed the judgment of the common pleas upon the whole record, and ordered execution for a return of the property to the defendants.

The plaintiff, Hymann, brought a writ of error, and assigned errors generally, and removed the judgment into this court.

P. J. Joachimssen, Attorney and Counsel for plaintiff in error.

First. The judgment of the supreme court ought to be reversed, because :

1. There is no judgment whatever upon the issue of fact found in the supreme court for the plaintiff in error.

2. The supreme court upon the issue in that court found for the plaintiff in error, ought to have given judgment according to the finding of the jury upon the matter of fact.

3. The supreme court, upon the pleadings in error and verdict, were bound to reverse the judgment of the New-York common pleas. (*Cunningham v. Houston*, 1 *Strange*, 127; *Davenant v. Rafter*, 2 *Ld. Raym.*, 1047; 2 *Tidd's Practice*, 1121; 1 *Arch. Prac.* 256, *ed.* 1827; *Acker v. Ledyard*, 1 *Denio*, 677; 2 *R. S.* 499, (601,) § 62; 1 *Ld. Raym.* 1047, 1005; 1 *Salk.* 267, *S. C.*; 3 *do.* 399, *S. C.*; 6 *Mod.* 206, 113; *Holt.* 275.)

Second. The judgment of the common pleas ought to have been reversed, because :

1. The non-suit was erroneous. The plaintiff sufficiently proved :

(1.) Title to the property replevied.

(2.) Possession. (*Shindler v. Houston*, 1 *Denio*, 51.)


(3.) An unlawful exercise of dominion over his property by the defendants, which constitutes a “taking.” (*Craig v. Smith*, 5 *Law Reporter*, 102; *Allen v. Crary*, 10 *Wend. R.* 349; *Root v. Chandler*, *id.* 110; *Wood v. Nixon*, *Addis. Rep.* 131.)


A wrongful detention is evidence of and constitutes a “taking.” (*Evans v. Elliott and others*, 5 *Adol. & Ellis O. S.*, p. 142.)

 Every detention is a taking. 

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2. After the election to take an assessment of damages the defendants could not require a judgment *de retorno habendo*. (2 R. S. 437, (530,) § 55.)



 REPLY.—We have to pay the costs of trying the issue on which we have succeeded.

Sale of casks in bulk—no particular quantity—no number. (23 Wend. 462.) 

*Benedict & Boardman, Attorneys, and
Charles O'Connor, Counsel, for defendants in error.*

First. The judgment of the court of common pleas was not erroneous.

1. The plaintiff below bought from the defendants below two lots of horn-tips, which the defendants below offered to deliver in bulk; but the plaintiff below refused to accept such delivery, and required the lots to be counted. Before the counting was completed, the defendants below retracted their offer, and declined to make the delivery. On this state of facts, the plaintiff's remedy was assumpsit on the agreement of sale. (*Chitty on Contracts*, 375, note 1, and cases cited, 5th Am. ed., Springfield, 1842; *Ward v. Shaw*, 7 Wend. 404; *Riddle v. Varnum*, 20 Pick. 280; 3 N. H. 457.)

 5th Ad. & El. cannot be supported. But not necessary to say that. 

2. If the property in the goods passed to the plaintiff, still the defendants had never relinquished the possession of the goods; and their refusal to deliver was, at most, a mere *detention*, and not an unlawful taking. (*Gardner v. T*—, 15 Johns. R. 401; 20 J. R. 465; 2 R. S. 523, § 6 & 36; *Nichols v. Nichols*, 10 Wend. 630; 3 R. S., 2d ed., p. 767; *Hale v. Clark*, 19 Wend. 498; 17 J. R. 116; 17 Wend. 58; *Barret v. Warren*, 3 Hill, 348; *id.* 282.)

Second. The judgment of the supreme court is not erroneous.

1. Although the matter of fact pleaded by the defendants in error in the supreme court, in bar of the plaintiff's right to maintain his writ of error, was found against them, yet they

had a right to be heard on the whole matter on the record; and, there being no error in the judgment of the common pleas, the supreme court was bound to affirm it. (*This case reported in 2 Denio, 201, and cases cited.*)

1. Judgment does not pass, as of course, upon a verdict in such case. The settled practice is otherwise. (*Brown v. Lerow, 2 Cow. 525; 4 id. 17; 2 Denio, 201.*)

2. In any ordinary suit, the defendant, after a regular default, or an unexceptionable verdict, may move in arrest, if upon the whole record it appears that the plaintiff is not entitled to judgment.

3. A default or verdict cannot establish more for the plaintiff than a general demurrer would; and yet a general demurrer is as good an answer to an assignment of errors in law as the common joinder.

4. It has long been settled law that, in a case like the present, the court must examine the whole record, and reverse or affirm, according to law, upon the *facts* therein stated.

5. An *express* admission upon the record of a matter of law would not bind the party making the admission; much less would it be proper to adjudge the law according to an admission merely *implied* from the defendant's failure to establish an independent fact on which he relied as an objection to the regularity of the suit. (*7 Wend. 478; 4 Cow. 534, 94; 2 do. 36, 38, note, form of assignment; 2 Caines, 138.*)

II. The infancy of the plaintiff in error appearing of record in the supreme court, is no ground of reversal.

1. The plaintiff was of age when he brought his writ; and he waived the complaint of *error in fact* by assigning merely error in law.

2. Had he, in replying the infancy, claimed that there was error on that ground, it would have been a clear case of departure in pleading—a total desertion of the case made by his assignment of errors.

3. If infancy was relied upon as *error in fact*, it should have been assigned; and then the defendants in error might have defended themselves in several modes.

- (1.) By pleading a release of *that* error.
- (2.) By procuring an amendment of the record, and showing that the plaintiff appeared in the court below by next friend.
- (3.) By summary proceedings in the common pleas against the attorney who prosecuted the replevin, on which, perhaps, he would have been compelled to adjust, at his own cost, all difficulty resulting from *this error on his part*. (2 R. S. 446, § 2; 11 Wend. 166.)

☞ No such point made on the other side—from II. ☞

☞ Case 6 Mod. 206, and in other books. Though an actual error in fact is in effect error in record, want of original, &c., is specially assigned for error, and certiorari goes to certify instead of trial by jury. ☞

Third. The judgment of the supreme court should be affirmed.

JEWETT, Ch. J. The plaintiff claims a reversal of the judgments below: 1st. On the ground that upon the pleadings in error and verdict upon the issue in fact found for the plaintiff, the supreme court was precluded from looking into the record, as there was no joinder in error, and was bound to give a judgment of reversal as a matter of course, whether there was error in law in the judgment of the common pleas or not, as that by the pleadings error in law was confessed.

A non-enumerated motion was made in this cause on the part of the plaintiff at a special term of the supreme court, (2 Denio, 201,) for a rule reversing the judgment of the common pleas, founded upon the papers which would make the usual error book and the postea and circuit minutes, when it was held that the court must look into the record just as it would have done had there been a joinder in error, instead of a plea in bar, and that a judgment would be given upon the same principles which would govern, if there had been a joinder in error, instead of a plea in bar; subsequently error books were made and the cause brought to argument upon the calendar at a general term.

It was insisted on the argument by counsel for the plaintiff, that as the plea *in nullo est erratum* and the plea of the statute

of limitations were inconsistent, and could not be pleaded together, (*Acker v. Ledyard*, 1 *Denio*, 677,) the defendants in error, by pleading the statute, lost the benefit of the other plea; that when an issue in fact, joined upon the plea of the statute, was found for the plaintiff, the judgment, upon which error was brought, must be reversed of course, although by looking into the record of the judgment, the court could see that there was no error therein, as error therein was confessed by the pleadings.

That if the court, after such issue in fact had been found for the plaintiff, would still take notice of the record, so far as to see whether there was error in it or not, and render a judgment accordingly, as upon a plea of *in nullo est erratum*, it would involve the inconsistency of giving the defendants the benefit of both pleas indirectly, which they could not have directly.

I think the result of the authorities are, that the court ought not to give judgment of reversal, if there be no error in law, notwithstanding *in nullo est erratum* is not put in; and though it be true, that the defendants in error will then have the same advantage indirectly, as if they had pleaded that there was no error, which could not be permitted with the plea of the statute of limitations, the general rule is, that the court, *ex-officio*, must give the proper judgment, according to the right appearing upon the whole record. (*Dive v. Manningham*, *Plowden*, 66; *Carleton v. Martagh*, 6 *Mod.* 113, 206; *Meredith v. Danes*, 1 *Salk.* 270; *Rex v. Wilkes*, 3 *Burr* 2551; *Castledive v. Mundy*, 4 *Barn. & Ad.* 90; *Bret v. Papillon*, 4 *East.* 502; *Fraunee's case*, 8 *Coke*, 93 *A*; *Cunningham v. Houston*, 1 *Strange*, 127; *Davenant v. Rafter*, 2 *Ld. Raym.* 1046.)

2nd. That the judgment of the common pleas is erroneous, because the evidence given on the trial showed, or tended to show, a *wrongful taking* of the property replevied by the defendant.

At common law, replevin only lay to recover personal property, which had been *tortiously taken*, either originally or by construction of law, by some act which made the party a trespasser *ab initio*. A wrongful detainer, after a *lawful taking*,

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is not equivalent to wrongful, original taking. (*Many v. Head*, 1 *Mason R.* 319.) Where the taking was lawful, and the subsequent conversion was *wrongful*, *detinue* was the only remedy to recover the property *in specie*. They are both possessory actions; the former was governed by the principles applicable to trespass *de bonis asportatis*, the latter by those applicable to trover. (*Pangburn v. Patridge*, 7 *John.* 140; *Chapman v. Andrews*, 3 *Wend.* 240; *Rogers v. Arnold*, 12 *Wend.* 30.)

By 2 *R. S.* 553, § 15, the action of detinue was abolished, and the remedy by replevin was extended, so as to include cases of the wrongful *detention* as well as the wrongful *taking* of chattels. (2 *R. S.* 522, § 1.) But the distinction between *taking* and *detaining* is required to be maintained in the writ and declaration, and the plea differs both in its language and consequences in the two cases. (§§ 6, 36, 39, 40; *Nichols v. Nichols*, 10 *Wend.* 630.) In this case, the action being for a wrongful *taking*, it follows, if there was no evidence given tending to show the defendants chargeable with such act, the common pleas was right in non-suiting the plaintiff, although the evidence showed them chargeable with a wrongful *detention*.

Conceding that the contract for the purchase of the horn-tips was consummated, and that under it the title to the property passed to the plaintiff, as I think it must be, at least, for the purpose of determining the question made on the trial, the evidence showed that the plaintiff declined then to take away the goods, and left them in the possession of the defendants in their store to keep, until he could count and take them away during the following week, thus constituting the defendants his naked bailees for the safe keeping of the goods to be delivered to him at the place of deposit and time appointed, if required. In this situation the plaintiff called at the time and place appointed, and while in the act of counting, preparatory to securing and taking the property away, under the allegation, that in making the payment of the price of the goods, by some mistake it fell short by the sum of \$100, Perkins refused to allow the plaintiffs to complete the count or take the goods away.

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Now, unless this act of Perkins constituted a tortious *taking* by the defendants, or one of them, it is clear that trespass *de bonis asportatis*, or replevin in the *cepit*, could not be sustained. The defendants were lawfully holding the possession of the property at the time. Perkins refused to permit the plaintiff to take it away; and, of course, there had been no *taking*, up to that time. What followed, at most, was but a wrongful *detention*; and having the possession of the goods as bailees, by the authority of the plaintiff, the defendants could not by any subsequent wrongful act, as by converting the same to their use, have made themselves trespassers *ab initio*, and therefore replevin for an unlawful *taking* could not be sustained. (*Hale v. Clarke*, 19 *Wend.* 498.)

But it was insisted by the plaintiff's counsel that a wrongful *detention* is evidence of, and constitutes a *taking*; and the case of *Evans v. Elliott*, 5 *Adol. & Ellis*, 142, was referred to as sustaining the proposition. That was an action of replevin for taking and detaining certain cattle, &c., against J. Elliott, S. Elliott and T. Patrick. There was an avowry by the two Elliotts, and cognizance by Patrick, for rent due to the two Elliotts. Plea by the plaintiff that, after the taking of the cattle, &c., and before the impounding of the same, to wit, &c., the plaintiff tendered and offered to pay to Patrick, then being the bailiff of J. & S. Elliott, and by them duly authorized to receive the said rent, and make said distress, the said sum of, &c., so due for rent, as in the avowry, &c., mentioned, together with a certain sum of money, to wit, &c., for the costs and expenses of the taking the distress, the last said sum being reasonable and sufficient for the costs, &c., which several sums Patrick refused to accept, and afterward unjustly detained the said cattle, &c. There was a demurrer, assigning for causes that the plea did not sufficiently traverse, or confess, and avoid the matter in the avowry and cognizance, in this, that it is pleaded to the whole avowry and cognizance, and contains matter in answer only to part, the avowry and cognizance justifying the taking and detaining, and the plea not showing that the taking was not justified. There was a joinder. Lord DENMAN, C. J., said, "This is a very

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critical objection; and it seems to me that the plea in bar is good enough. Every unlawful detention is a taking. It is said that the plea in bar distinguishes between the taking and the detention; and that the plaintiff might have pleaded that after the tender, the defendant again took and detained. But I do not see that, even as the plea stands, the taking complained of is necessarily confined to the taking *before* the tender.

"The cases show that the damages recovered would be only for such unlawful taking as would be shown to the jury."

LITLEDALE, J., said, "I am entirely of the same opinion. The detention after the tender satisfies the declaration."

PATERSON, J., said, "The authorities cited by Mr. Williams show that replevin lies for detaining, and that is, as for a new taking."

The judgment of the court in that case proceeded upon the ground that it was competent for the plaintiff to plead to the avowry and cognizance, that after the tender the defendants again took and detained the distress, &c., and that as the plea stood it was not necessarily confined to the *taking before* the tender; and the remark that "every unlawful detention was a taking," was made in reference to an unlawful detention of a distress for rent, made under authority given the party by law, which unlawful act rendered the party a trespasser *ab initio*; in that sense the remark may be correct. But it has no application in this case. The counsel for the plaintiff on the argument insisted that any unlawful interference with the property of another, or exercise of dominion over it, by which the owner was damaged, was sufficient to maintain replevin for *taking*, or trespass *de bonis*, and *Allen v. Crary*, 10 Wend. 349, was referred to as an authority to sustain the principle. The principle, without any doubt, is true, and the authority is in point; but, as I think, neither the principle nor authority have any application here, as I understand the facts in the case. There the defendant who was sued in replevin in the *cepit* had pointed out the property in question, and directed the sheriff to levy on it (it being the property of Allen the plaintiff) on an execution in his (the defendant's) favor against one Rowan.

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The court rightly held, that a sheriff is a trespasser who levies upon goods which are not the property of the defendant in the execution : he acts at his peril in such cases ; his process only authorizes him to seize the defendant's property, and if the plaintiff in the execution direct the levy to be made, he is also a trespasser. The officer in such a case is his servant or agent, and trespass or replevin would lie against either of them. In this case the defendants neither took nor directed any other to take the property. The most they did was, to refuse to deliver the property to the plaintiff, having a lawful possession of it.

When the non-suit was ordered, the defendants being entitled to a return of the property, by their counsel stated that he would take an assessment of damages under the statute ; but before any further step was taken in the cause, he stated to the court that he would waive the assessment of damages, and take a judgment for a return of the property. The plaintiff's counsel objected on the ground that the defendants had elected an assessment of damages, that the jury had remained impaneled, and that the defendants had thereby waived and precluded themselves from such judgment. The objection was overruled and an exception taken, upon which the jury assessed the value of the property.

It was a matter within the discretion of the court to allow the defendants to waive their election to have an assessment of damages and take judgment for a return, especially as nothing had been done under that election.

I think there is no error in the judgments of the courts below, and that the judgment of the supreme court should be affirmed.

BRONSON, J. As the issue of fact which was joined in the supreme court was found for the plaintiff, he insists that the judgment of the common pleas should have been reversed, whether there was any error in the record and proceedings or not. Another argument of the question has not changed, but has confirmed the opinion which I expressed when the case was before the supreme court on motion. (2 *Denio*, 201.) All the cases on which the plaintiff now relies were examined then, though some of them are not mentioned in the report. The verdict only settled that the plaintiff was not barred of his writ

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of error, and left the question still open, whether in truth there was any error in the judgment of the common pleas. The distinction is between error in fact and error in law. When error in fact is assigned, and is found or adjudged in favor of the plaintiff, the judgment will be reversed; for though there may be no error in the record, it appears *dehors* the record, that there was error. But when error in law is assigned, if the defendant plead some matter in bar of the writ of error, as the statute of limitations or release, and the matter be found or adjudged against him, nothing appears beyond the fact that the plaintiff is not barred of his writ of error; and the court will look into the record to see whether in truth there be any error. If the matter pleaded in bar be found or adjudged in favor of the defendant, the court does not affirm the judgment, for it may be that there are errors in the record; the entry is, that the plaintiff take nothing by his writ of error. I do not now recollect any case where the judgment is either affirmed or reversed without looking into the record, except where judgment passes by default in the appellate court, and where error in fact is assigned and is found or adjudged in favor of the plaintiff.

The common pleas was right in holding, that at the most there was nothing but a wrongful detention of the goods, and that replevin in the *cepit* would not lie. It is clear upon the evidence that the property was never out of the possession of the vendors, and, consequently, that they could not have taken it from the plaintiff. It has been settled quite too long to allow it to be questioned now, that, at the common law, replevin will only lie where trespass might have been maintained; and although our statute authorizes the action for an unlawful detention, as well as for an unlawful taking, the distinction between the two cases is to be kept up in the writ and pleadings; (2 R. S. 522, § 1, 6, 36, 39, 40;) and in this, as well as in other cases, the plaintiff must prove his case as it is laid, or, he cannot recover. There have been many instances where the plaintiff has failed in the action of replevin, because he had declared in the *cepit* instead of the *detinet*.

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We are referred to a *dictum* of Lord DENMAN, C. J., in *Evans v. Elliott*, (5 *Ad. & El.* 142,) that every unlawful detention is a taking. But the case only decides that on a distress for rent, if the tenant tenders the rent, with costs, before the cattle are impounded, he may have replevin for the subsequent unlawful detentions. Whether this decision *can* be supported may admit of question. (See *Gardner v. Campbell*, 15 *John.* 401; *Hall v. Clark*, 19 *Wend.* 498.) But it is enough for the present occasion to say that it was a case where a wrongful act had been done after distraining the goods; and so were all the cases which were cited in support of the decision. The doctrine that every unlawful detention is a taking, for which replevin in the cepit will lie, is not only *at war* with the distinction taken in our statute, but is in conflict with many adjudications.

But there is a still more serious difficulty in the plaintiff's way. The title to the property never passed out of the vendors. Although the witnesses and the bill of parcels speak of the sale of nine casks of horn-tips, it cannot be denied, upon the evidence, that it was a sale of some specified quantity of tips, which quantity was to be ascertained by counting. The vendors requested the plaintiff to count and take them away as soon as he could, as they had no room for them; and the plaintiff said he could not take them away until he had counted them. The counting was commenced, and it progressed until it had been ascertained that there were 1800 less tips of one kind *than the number agreed to be sold*. I need not refer to cases to prove that so long as any thing remains to be done between the parties, as weighing, measuring, counting, or the like, the title to the goods has not passed, but is still in the vendor. It is impossible to maintain that the plaintiff was bound to accept what tips might be found in the nine casks, although the quantity was deficient; and he never proposed or offered to accept any less than the quantity for which he had agreed. If the vendors were in fault, the plaintiff has a remedy; but he cannot maintain replevin.

I see nothing in the other questions made by the plaintiff

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which calls for a remark ; and am of opinion that the judgment of the supreme court should be affirmed. Judgment affirmed.

WRIGHT, J. This was an action of replevin in the *cepit*, and on the trial in the common pleas the judge non-suited the plaintiff on the ground that there was no evidence of a *wrongful taking* ; but at most, only of a *wrongful detention* of the goods. It is admitted, that if the plaintiff gave any evidence of a tortious taking, however slight, the case should have been submitted to the jury.

The action being in the *cepit*, there can be no doubt that if the defendants lawfully acquired the possession of the goods, the plaintiff must fail ; although it is not clear that had it been in the *detinet*, it might not have been sustained by showing a tortious taking only. The important question, therefore, in the case, is, whether there was any evidence of a wrongful taking by the defendants. The solution of this question depends upon several inquiries. 1st. Did the evidence offered show the general property of the goods to be in the plaintiff? 2nd. Had there been an actual or constructive delivery of them to him, and was he in actual or constructive possession? 3rd. Was there, on the part of the defendants, such an interference with or unlawful exercise of dominion over the property as to constitute them trespassers? It is an established principle that replevin in the *cepit* will only lie where trespass might have been brought ; but in my view, if the two first inquiries are satisfactorily solved for the plaintiff, there will be little difficulty in determining the latter in his favor. In cases of tortious taking, trover, trespass *de bonis asportatis* and replevin, are concurrent remedies ; and the same interference with a man's goods, which would amount to a wrongful taking in trespass, would have the like effect in replevin. My brother JEWETT supposes that the defendants were naked bailees of the goods, and that, consequently, the form of the action was misapprehended ; but I can discover nothing in the facts of the case to lead to such a conclusion.

1. As to the right of property in the goods. It is a familiar principle of the case of contract, that although a contract for

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the sale of goods be complete, and binding in other respects, the property in them remains in the vendor, and they are at his risk, if any material acts remain to be done before the delivery, either to distinguish the goods or to ascertain the price thereof. If something remains to be done, as between vendor and vendee, for the purpose of ascertaining either quality, value or quantity, such as measuring, weighing, or counting out of a common parcel, there is no delivery. (*Chitty on Contracts*, 375, 6th Am. ed. ; *Harrison v. Meyer*, 6 East, 614; 1 Denio, 51.) It is insisted in this case by the counsel for the defendants, that the plaintiff bought two lots of horn-tips, which the defendants offered to deliver in bulk ; but the plaintiff refused to accept such delivery, and required the lots be counted. Before the counting was completed, the defendants retracted their offer, and declined to make the delivery. If these were the facts, the judgment of the common pleas was clearly right, as no property passed to the plaintiff, something remaining to be done before the goods were delivered. But I do not so understand the evidence, nor, in my judgment, is it susceptible of such a construction. The facts are, that the defendants held themselves out to the public as manufacturers of combs, and importers of English, French, and German fancy goods. They kept a store or warehouse in the city of New-York. On the 3rd August, 1839, the plaintiff, through his agent, and in the ordinary course of trade, purchased from them, for cash, nine casks of horn-tips in bulk, at the price of \$260 ; fifty dollars of which price was paid immediately, and the balance, amounting to \$210, two days afterward. A bill of sale of the property, in bulk, was given by the defendants to the plaintiff's agent, and also receipts of payment of the price. The casks were in the lower part of the store of the defendants, and were pointed out to the plaintiff's agent ; and after the price had been fully paid, and the receipt given, he was directed by the defendants to take the tips away. There is no evidence of an agreement to count the tips, or that the number in any way entered into the bargain, or that the value or price depended at all upon the number. Indeed,

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the written evidence is conclusive that the tips were purchased, and paid for at a stipulated price in bulk; and that at the payment and receipt of the money, as between vendor and vendee, the contract was fully executed. Nothing remained to be done by the parties by way of identifying or setting apart the property. It in no part of the evidence appears that the plaintiff's agent refused to accept the delivery of the casks; but, on the other hand, the evidence is that he went to the store the day following to take them away. Although, for his own convenience, or for any other cause unconnected with the sale, this agent may have desired to count the tips on the defendant's premises before taking them away, as between vendor and vendee nothing remained to be done to consummate the agreement and pass the right to the property. It was no longer at the risk of the vendor, and had it become destroyed by fire on the premises of the defendants, the loss would have fallen on the plaintiff. The payment of the agreed price or consideration for the sale absolutely vested in him the property contracted for.

2. Was there a delivery to, and possession of the property in the plaintiff? Where a sale is *bona fide*, and for a valuable consideration, slight evidence of delivery is sufficient. (*Shumway v. Rutter*, 8 *Pick.* 443.) Goods are delivered when they are placed in the vendee's power, so that he may immediately remove them, and cannot be rightfully prevented from so doing. (*Smith's Mercantile Law*, 499, and cases cited.) Where a sale is for cash, and payment is made, the vendor is bound to deliver; and delivery may be inferred from slight circumstances. It is a rule, that where by the contract itself the vendor appropriates to the vendee specific chattels, and the latter thereby agrees to take them, and to pay the stipulated price, the very appropriation of the chattels is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattels, and to pay the specific price, is equivalent to his accepting possession. (*Chitty on Contracts*, 375.) There is no case contradicting the principle, that when a vendor of goods has ascertained and appropriated them, and the vendee has assented to such

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appropriation, the property passes to the latter. (*Hilliard on Sales*, 136.) In this case, the evidence shows not only a contract appropriating by the defendants to the plaintiff the nine casks of horn-tips, and an assent of the latter to take them, and pay the stipulated price, but also payment by the vendee, a special direction to take possession of them on the part of the vendors, and an acceptance by the vendee. There was at least a constructive delivery by the vendors, unless I have wholly mistaken the terms of the contract and its legal effect in connection with the acts of the parties; and the defendants are clearly right in supposing that the evidence shows that they offered to deliver in bulk; but that the plaintiff refused to accept such delivery, and required the tips to be counted, it seems very clear that no such supposition can be fairly deduced. It is true, that after the contract was consummated by the payment of the money, the vendee's agent took actual possession of the property, and with the assent of the vendors proceeded to count the tips on their premises; but there is no evidence that the counting was in any way to affect the contract of sale, or to regulate or control the price or value of the goods purchased. There is no intimation that any portion of the price already paid was to be refunded in the event of the tips falling short of a given or agreed number. As I look upon this matter of counting, it was an act solely of the plaintiff, transpiring subsequently to the transfer of the property to him, and by which the defendants were not, nor could not be in any respect affected. The plaintiff had paid a sum in gross for the nine casks, and whether there was a greater or lesser number of tips could make no difference. It appears to me, therefore, to infer as a matter of law that the right of property did not pass, or that the counting of the tips was, by the terms of the contract, a precedent condition to the delivery and vesting of the property in the plaintiff, would be clearly erroneous.

There being a cash sale, payment made, and a constructive, if not an actual delivery of the goods, the absolute right to, and possession of them vested in the plaintiff, the effect of which absolute investment was to enable him to hold them against all

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others. His possession was either actual or constructive: actual, if in his custody and under his immediate control; constructive, if having the right to reduce them to immediate possession; for a general property in a chattel always draws to it a possession in law. In either case he might maintain trespass or replevin for an unlawful taking. But I think the facts show the plaintiff to have been in actual possession of the goods the day following the sale, and up to the time of the alleged taking by the defendants. His agents had gone to the store of the defendants, and inquired whether they could get at the casks to count the tips and take them away. They were told that they must count them and take them away as soon as they could, as the defendants had no room for them. They set about counting, emptying the contents of each cask, separately, upon the floor, and counting the tips back into it. They had emptied and counted four or five of the nine casks in this way, and were still engaged when the defendants interfered, and would not let them take them away; setting up the unfounded pretence that they had not paid for them, and refusing to suffer them to be taken away solely upon that ground. The facts show the plaintiff to have been in actual possession of the property subsequent to the sale and prior to and contemporaneous with the interference of the defendants. It is true, that it was on the premises of the defendants; but the plaintiff's agents were there holding it by their express assent. Indeed, in the absence of any proof of assent, I think the plaintiff had an undoubted right to enter to possess himself of the property and take it away; for in a sale of goods, absolute and complete, in a store or warehouse, the legal right of the purchaser to enter, possess himself of them, and take them away, is implied, as an incident of such sale. In this case, however, there was an express license by the defendants that actual possession might be taken on their premises, and such license being given, if subsequently, without any abuse of it by the plaintiff, the defendants exercised an unlawful dominion over the property, I cannot think that they were the less trespassers. I cannot adopt the doctrine, that an individual may not, even on his own

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premises, tortiously take the property of another, when that other holds the actual possession on such premises of the specific property with his assent.

The judge, in non-suiting the plaintiff, admitted that he had given evidence of a wrongful detention. If by the terms of the contract, the property did not absolutely vest in the plaintiff, but something remained to be done by the parties as a precedent condition to the delivery and sale, the legal possession continued in the defendants; and such possession being legally in them, there could be no wrongful detention; nor could they, as one of my brethren supposes, be constituted bailees for the plaintiff. A wrongful detention, as against the plaintiff, supposes that he is entitled to the possession of the goods, and that they are unjustly detained, though the original possession of the defendants was lawful. If, as the counsel for the defendants insist, the property had not absolutely vested in the plaintiff, but the contract was still executory, there could be no wrongful detention, nor could replevin in the *detinet* be maintained. The admission, therefore, that there was evidence of a wrongful detention in effect admitted the title to the property and the right of possession to be in the plaintiff. So also, if the property in the goods had not absolutely vested in him by sale and delivery, the defendants could in no sense be considered as his bailees.

3. Was there, on the part of the defendants, such an interference with, or unlawful exercise of dominion over the property as to constitute them trespassers? For if their acts were such, as in judgment of law to make them trespassers, replevin in the *cepit* will lie against them. The defendants insist, that if the property in the goods passed to the plaintiff, trover was the proper remedy after demand and refusal. Why, if I am right in my conclusions that the title was in the plaintiff, and that there was a delivery and an actual or constructive possession, any exercise or claim of dominion, though by mere words, the defendants having the goods within their power, amounts to such a taking as to warrant an action of trespass. (23 *Wend. R.* 466.) Our own courts have repeatedly decided that a mere claim of dominion, an intention being indicated to interfere

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with the goods, under pretence of any right or authority, amounts to a constructive trespass. An actual manucaption of goods is not necessary to constitute a tortious taking. This has often been held. To maintain trespass or replevin evidence of an actual, forcible dispossession of the plaintiff is not necessary; any unlawful interference with his property by which he is damnified is sufficient to maintain either action. (10 *Wend. R.* 350.) The evidence in this case shows an exercise of dominion over and interference with the property by the defendants; not as bailies for the plaintiff, nor for the reason that the sale had not been fully consummated. The plaintiff's agent, who had the property in custody, distinctly states that they thus interfered, and would not suffer him to take it away, assuming a right to hold and an absolute exercise of dominion over it. And they thus continued their claim of dominion up to the replevy. It appears to me, therefore, that there was such a wrongful taking shown as amounted to a trespass; and if so, the form of action was not misapprehended. But if I am wrong in relation to the strength or degree of evidence on this point, the question should have been submitted to the jury. I am unwilling, under the circumstances of this case, to conclude, as is contended, that because the property had not, after the sale, been actually removed from the premises of the defendants, they may exercise an absolute control and dominion over it, in opposition to, and in exclusion of the rights of the plaintiff, and yet, that trespass or replevin will not lie against them. If this be so, the law will, in numerous instances, work manifest injustice.

I am of the opinion that the judge erred in non-suiting the plaintiff upon the assumption that there was no evidence of a wrongful taking. The property being in the plaintiff, the question, whether there had been a tortious taking, turned upon matters of fact for the jury to find from the evidence. That evidence should have been submitted to them.

DECISION.—Judgment affirmed.

For affirmance, JEWETT, Ch. J., BRONSON, JONES, RUGGLES and GARDINER. For reversal, WRIGHT, JOHNSON and GRAY.

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NOTE.—JEWETT, Ch. J., (as to the record,) *held*, that the result of the authorities was, that the court ought not to give judgment of reversal, if there be no error in law, notwithstanding *in nullo est erratum* is not put in; and though the defendants in error would have the same advantage indirectly, as if they had pleaded that there was no error; which would not be permitted, with the plea of the statute of limitations. The general rule is, that the court *ex officio* must give the proper judgment according to the right appearing upon the whole record.

Held, (on the merits,) that the defendants, at the time of refusal to let the plaintiff have the goods, had the possession thereof as *bailees*, by the authority of the plaintiff; and could not by any wrongful subsequent act, as by converting the same to their own use, have made themselves trespassers *ab initio*; and replevin for an unlawful *taking* could not be sustained.

It was a matter within the discretion of the court to allow the defendants to waive their election to have an assessment of damages, and take judgment for a return.

BRONSON, J., (as to the record,) was, after another argument, confirmed in the opinion which he expressed when the case was before the supreme court, on motion (2 *Denio*, 201) that the verdict only settled that the plaintiff was not barred of his writ of error; and left the question still open, whether in truth there was any error in the judgment of the common pleas.

Did not recollect of any case where the judgment is either affirmed or reversed, without looking into the record, except where judgment passed by default in the appellate court; and where error in fact is assigned by and is found or adjudged in favor of the plaintiff.

Held, (on the merits,) that it was clear upon the evidence that the property was *never* out of the *possession* of the vendors, and consequently they could not have taken it from the plaintiff. At the common law replevin will only lie where trespass might have been maintained; and although our statute authorizes the action of replevin for an unlawful detention, as well as for an unlawful taking, the distinction between the two cases is to be kept up in the writ and pleadings.

And further *held*, that in this case the *title* of the property *never passed out of the vendors*. Upon the evidence it was, undoubtedly, a sale of some *specified quantity* of tips, which quantity was to be ascertained by counting, and the counting not having been completed, the title remained in the vendors.

WRIGHT, J., (*dissenting*, discussed only the merits,) *held*, that the evidence showed that the plaintiff, through his agent, and in the ordinary course of trade, purchased from the defendants, for cash, nine casks of horn-tips *in bulk*; the amount was paid, and the defendants gave a bill of sale of the property *in bulk*; and also receipts of payment of the price. After the price had been fully paid and the receipts given, the plaintiff was directed by the defendants to take the tips away. There was no evidence of an agreement to count the tips, or that the number in any way entered into the bargain, or that the value or price depended at all upon the number. That the written evidence was conclusive that the tips were purchased and paid for at a stipulated price *in bulk*; and that at the payment and receipt of the money, as between vendor and vendee, the contract was fully *executed*. Nothing remaining to be done to consummate the

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agreement, and pass the rights of the property, it was no longer at the risk of the vendors. The payment of the agreed price or consideration for the sale, absolutely *vested* in the plaintiff the property contracted for.

Also *held*, that the evidence showed, at least, a constructive, if not an actual *delivery* of the property to the plaintiff; and that the plaintiff was in the actual possession of it, subsequent to the sale and prior to and contemporaneous with the interference of the defendants.

It made no difference that the property was on the defendants' premises; the plaintiff's agent was there holding it by the express assent and license of the defendants. And in the absence of any proof of assent, the plaintiff would have had a right to enter and possess himself of the property and take it away.

The admission that there was evidence of a wrongful *detention* in effect, admitted the title to the property, and the right of possession to be in the plaintiff. If the title to the property was not absolutely vested in the plaintiff, and the contract remained executory, there could be no wrongful detention by the defendants.

If, therefore, the title of the property was in the plaintiff, and there was a delivery, and an actual or constructive possession, any exercise or claim of dominion by the defendants, though by mere words, the defendants having the goods within their power, amounts to such a taking as to warrant an action of *trespass*, and consequently replevin in the *cepit*.

Also *held*, that the evidence showed such an exercise of dominion over and interference with the property by the defendants, not as bailees for the plaintiff, nor for the reason that the sale had not been fully consummated, as constituted a wrongful taking. At least it was a question for the jury; and the plaintiff should not have been non-suited.

FRAZER AND OTHERS, appellants, *agt.* WESTERN AND OTHERS,
respondents.

Questions discussed.

1. Whether there can be a *bona fide* purchaser from a person who is entitled to property by deed of gift, or a voluntary settlement; in case it afterward turns out that the grantor was indebted to such an extent that the conveyance or voluntary settlement would operate as a fraud upon his creditors?

2. Whether the mere fact that the purchaser from the holder of such a title has notice that it was not founded upon a *pecuniary consideration*, but was voluntary, is sufficient to make it his duty, at his peril, to *inquire* whether the title of his grantor was not fraudulent as against creditors?

3. Whether, under the evidence in this case, Western, one of the respondents, who purchased under a *voluntary trust deed*, was acquainted with the circumstances of the *grantor* at the time the trust deed was executed, so as to make it

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his duty *to inquire* whether the deed of trust was not intended as a fraud upon the creditors of the grantor?

4. Whether Western acquired the *legal title* to the premises in question, so as to entitle him to protection as a *bona fide* purchaser without notice?

The bill of complaint in this cause was filed before the vice-chancellor of the first circuit by John Frazer, William H. Gibbs, and Charles Freeman, all of Charleston, in the state of South Carolina, complainants, against Henry M. Western, Mary Collins, Edward K. Collins, Sylvanus Miller, public administrator, and Ann Collins, Emma Collins, Israel Collins and Sextar Collins, infants, defendants, on the 30th day of April, 1833, showing that William Matthews, late of Charleston, South Carolina, on or about the 20th April, 1817, duly made and published his last will and testament, so as to pass both real and personal estate; that said William Matthews departed this life some time in the year 1817, leaving his said will in full force, unaltered and unrevoked; and Elizabeth Matthews, the executrix in the said will named, shortly thereafter caused the will to be duly proved according to the laws of South Carolina, and took upon herself the burden of executing the same, and that the other executors declined to act, and never did act as such executors.

That *Mary Collins*, in the said will, mentioned as one of the daughters of said William Matthews, was at the time of his decease the wife of *Israel G. Collins*, late of the city of New-York, deceased; that said Israel died in 1831, leaving said Mary Collins, his widow, and Ann, Emma, Israel, and Sextar, his infant children.

That all the devises and bequests in said will, for the benefit of the said Mary Collins, were made to the executors and executrix therein named, and to the survivors of them *in trust* to, and for the use of the said Mary *during her life, and, after her decease, to the use and behoof of her children*, to be equally divided between them.

That a part of the property so bequeathed for the benefit of the said Mary consisted of a large number of negro slaves, which were left by the said William Matthews at the time of

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his death, which slaves were useless and unprofitable to the devisees in the said will named, the testator having devised to them no lands whereon the said negroes could be employed; that thereupon, some time in the year 1818, *John Frazer*, the husband of *Ann Frazer*, in said will, *named in conjunction with the said Ann, and Israel G. Collins, the husband of the said Mary, in conjunction with the said Mary*, caused a bill to be filed in the court of equity in Charleston aforesaid, in the names of the said John, Ann, Israel, and Mary, against said Elizabeth Matthews, and her two other children, John and Susan, being minors, by their guardian, stating that the said negroes had been divided among them, and those which had fallen to the shares of the said Mary, Ann, and Susan, were useless and unprofitable, as the testator had devised to them no lands whereon the said negroes could be employed, and that the parties were all desirous that the negroes should be sold, and the proceeds vested in public stock, or other productive funds, for their benefit; and in which the husbands of the said Ann and Mary, and the guardian of the said Susan, readily acquiesced, subject to the provisions and limitations of the said will; that they had applied to the said executrix to assent to such sale, but by her answer to the said bill, stated she had no power under the will to assent, and that the sale could only be made by order of the court.

That a hearing of that cause was had in said court of equity at Charleston, whereupon it was ordered and decreed by the said court that the sale of the said negroes should be made by the master of the said court; and further, that *the said John Frazer and Israel G. Collins should be substituted as trustees of the parts and proceeds of their said wives, arising from said sales*, on the giving to the said master ample security in double the amount of the property to be received by them, to secure the same to the uses and trusts, prescribed by the will of said William Matthews.

That in pursuance of such decree, a sale of the said negroes was made by the said master, and the proceeds thereof received by him, and the proportions due to the said Mary out of said

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sale amounted to the sum of \$7,596.25, or thereabouts, which sum was paid over by the master to said Israel G. Collins on account of said Mary and her children, pursuant to said decree, *on his giving the security hereinafter mentioned.*

That at the time of paying over said moneys, said Israel G. Collins, on the 26th February, 1818, together with said John Frazer, his security, by their bond or obligation became held and firmly bound unto William H. Gibbs, master of equity in the said court, and to his successor in office or assigns, in the penal sum of \$15,192.50, with a condition that said Israel G. Collins or John Frazer, their or either of their heirs, executors or administrators, *do, and shall be answerable and liable in the said principal sum of \$7,596.25, with interest from the date, to be accounted for by the said Israel G. Collins, as thereafter required, subject to the trusts in the said will, then the said obligation to be void.*

That to all those proceedings the said Mary Collins was a party and assenting to the same; and has duly hitherto, both before and since the death of her husband, the said Israel, received the interest on the said bond or obligation; that the principal sum of money in the said bond mentioned still remains secured by said bond and unpaid.

That the said *Israel G. Collins, in order further to secure to his wife, the said Mary, and her children, according to the terms of the said last will and testament, the said sum of money in the said bond or obligation mentioned; and in like manner to save his said surety, your orator, the said John Frazer, harmless from all loss and damage under the said bond or obligation above mentioned; and by way of collateral security for the same, did, on the 7th August, 1828, by two certain deeds of bargain and sale, purporting to be made in consideration of one dollar, to him paid by Edward K. Collins, grant, bargain and sell, release, convey and confirm unto the said Edward, his executors, administrators, and assigns forever, all those certain lots of ground and premises described in said deeds as follows: (in the first deed giving a description of lot No. 55, situate in the ninth ward of the city of New-York, late the property of Isaac*

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Varian, deceased; and in the second deed describing all that south-westerly moiety or half-part of a lot situate on the east end of Staten Island, in the town of Castleton, in the county of Richmond, part of the farm of the late Abraham Van Duzer, deceased, containing four acres and a half of land, also all that south-westerly moiety or half-part of a certain water lot lying in front of the above.)

In trust, nevertheless, for the benefit and behoof of Mary Collins, wife of the said I. G. Collins, her heirs and assigns forever, and upon the further trust and confidence, they, the said Edward K. Collins, his executors, administrators or assigns, should and would release and convey all and singular the said thereby granted premises to such person or persons as she the said Mary Collins might, by her *last will and testament, or by her certificate in writing during her life time, and after the decease of the said Israel G. Collins, designate, and if no such last will and testament should be made, nor any such certificate be given*, then, that he the said Edward K. Collins should, after the decease of the said Mary Collins, release and convey the same to the heirs at law of said Mary Collins, and upon a further trust and confidence that he, the said Edward K. Collins, should and would at all times after the decease of the said Israel G. Collins, and until the said premises should be released or conveyed as aforesaid, *receive the rents and profits of the said premises, and pay over the same to the said Mary Collins, or her legal representatives.*

That said Israel G. Collins died some time in the year 1831, and that administration of all and singular the goods, chattels, rights, and credits which were of the said Israel, were, by the surrogate of the city and county of New-York, in due course of law, committed to Sylvanus Miller, public administrator, who took upon himself the burden thereof.

That the said *Israel, at the time of executing the two several deeds aforesaid, and at the time of his death was utterly insolvent, and has not left property sufficient to pay his debts, including the property so covered by the two several deeds aforesaid.*

That the said Mary Collins caused the property first above

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described, as situated in the city of New-York, to be sold pursuant to the language of the trust deed ; that the same sold for a large sum of money, which she duly received from the purchaser thereof, and that she is now proceeding by a bill of complaint against said Edward K. Collins, to compel a disposition and sale of the premises in the second deed above set forth, or some other execution of the trust in said deed, expressed, but for her individual benefit.

That said Mary Collins also insists upon payment of the said bond made by said Israel G. Collins and said John Frazer as aforesaid to the said master in chancery, for her benefit ; and refuses to credit what she has already received from the sale of the first-mentioned parcel of land on said bond, or to cause the same to be invested as the said will of said William Matthews requires, and in aid of said bond ; and also insists that both of said trust deeds are for her individual benefit, and were not made as collateral security for the said bond, and thus seeks to take absolutely under said deeds, and exacts at the same time, and in addition thereto, the payment of the bond aforesaid.

That Henry M. Western claims some title or interest in the said premises in said trust deed mentioned, by virtue of some conveyance from the said Mary, which, however, your orators charge to be in trust for her.

That your orators consider the said several deeds *as merely voluntary, and therefore void as against the creditors of the said Israel G. Collins, unless they are to be treated and considered as collateral security for, or as made in aid and discharge of the said bond or obligation, so far as the proceeds or value thereof might go,* and have requested the said Mary Collins, and the said Edward K. Collins, to carry into effect the said trusts in the said last-mentioned deeds expressed, by a sale thereof, and to invest the proceeds of the property in both deeds mentioned in the manner required in and by said last will and testament of said William Matthews, and to credit the amount of such proceeds on the bond aforesaid, or to give up the said deeds to be cancelled as voluntary deeds and void against creditors ; and have requested said Henry M. Western to give up or cancel any deed or

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writing he may have, so evidencing his title, or supposed title, as aforesaid, to the end that the proceeds thereof may, by due course of law, be disposed of by the said Sylvanus Miller in the course of administration, or by this court, to the end that the said bond or obligation being the first in degree among the debts due, and owing by the said Israel G. Collins, may be first paid out of the *proceeds*.

The bill then proceeds to charge that the several trust deeds were made by the said Israel at the time when he was insolvent and unable to pay his debts, and while the said bond was in full force against him, and therefore they are void, except in aid of the bond aforesaid; that said trust-deeds ought to be cancelled, to the end that the property may be sold and the proceeds disposed of in due course of administration, and the said bond as first in degree of debts duly paid, and the said John Frazer released therefrom. It also charges that said deeds can only be sustained as valid, if they were made, as charged, as collateral security to the said Mary Collins and her children, for the payment of said bond; and that said Mary is not entitled to the proceeds of said property in her own right, leaving said bond unpaid; and that the title of said Henry M. Western is fictitious, and created *without valuable consideration, and with a view to defeat your orators' rights herein*.

The separate answer of Henry M. Western, admitted, on information from the bill, all its principal statements, giving the proceedings in the case; and says he has no knowledge or information whether the said Collins died insolvent or not, but leaves the complainants to proof; but charges the truth to be, that the said Israel was not insolvent at the time of the date and execution of said last mentioned trust deed.

He admits that the said Mary Collins has filed a bill of complaint against said Edward K. Collins, to compel a disposition and sale of the premises in the said second deed mentioned, or some other execution of said trust, as in said bill is set forth; but saith that, at or before the sale of said last mentioned property to this defendant, said suit was abandoned by said Mary, and is at an end, her rights therein having entirely ceased.

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He further admits that he claims, and actually has, a good and valid title to the premises in the second aforesaid trust deed described, and that said title exists by virtue of a certificate from said Mary Collins, made in pursuance of, and in compliance with, both the terms and spirit of the trust deed aforesaid, and he alleges that the same is a conveyance in good faith, and founded on a full and valuable consideration; and he denies that the same is in trust for the said Mary Collins, or that she is to receive the benefit accruing therefrom, either by an express or any implied understanding whatever; but he alleges and states the truth to be, that said conveyance is to his own use and for his own benefit and behoof.

Further, that on the 11th January, 1833, he obtained a judgment in the supreme court against said Mary for \$326.37; that said judgment was an equitable, if not a legal lien on the title or interests of said Mary in said land; that he also had a claim against said Mary for services amounting to about \$300; and that said Mary sought this defendant to become purchaser of said land, alleging she was the owner thereof, and producing said original trust deed as evidence of such ownership; that this defendant then had no knowledge or no notice of any other matters than those expressed in said deed, and entered into a negotiation with said Mary for the purchase of said lands; that a parol bargain was made, and afterward reduced to writing and signed and sealed by said Mary, the original of which is in possession of defendant, ready to be produced, and which was also duly recorded before the filing of the bill of complaint in this cause; that in pursuance of said contract, this defendant proceeded on the 8th April, 1833, to pay to said Mary, and did pay to her the sum of \$1400 in cash, and at the same time executed and delivered to her a satisfaction of said judgment, and a discharge of said debt for \$300, at the same time delivering to her certain valuable papers, on which this defendant had a lien for said debt; that he then received from said Mary a full and absolute certificate, and also a full and absolute conveyance of said property, which he caused regularly to be recorded, and under which he entered upon the premises and

still holds possession of the same, and which, as he insists, has vested in him the whole title, both legal and equitable to said property. And he charges the truth to be, and believes, that as well said Edward K. Collins as John Anthon, Esq., the complainants' attorney, knew of said negotiation and contract between this defendant and said Mary, in time amply sufficient to have filed their bill, or given notice to this defendant before the payment of said consideration money.

That to perfect his title, he has tendered said certificate to said trustee, and also a release of said lands. But that said trustee hath refused to execute the same, and this defendant respectfully submits, whether, as all the parties interested are before the court, an execution of said release, by said trustee, to this defendant, ought not, before crediting said consideration money on said bond, (if so decreed,) to be decreed to this defendant.

That he has heard and believes, and therefore alleges, that the said trust deeds mentioned in said bill were given in consideration of certain property received by said Israel G. Collins, for account of said Mary, from the estate of the brother of said Mary Collins, who died in South Carolina, without that, that they were voluntary deeds, without valuable consideration as in said bill, &c.

But this defendant denies that even if the trust deeds were voluntary, they would be void as against the creditors of the said Israel G. Collins, he being entirely solvent and uninvolved in, and unembarrassed with, debt at the time of the execution thereof; and he further alleges, that even if they were void, as in said bill is stated, he has a valid and equitable claim against the said separate estate of the said Mary Collins, secured by said bond as aforesaid, to the amount of the consideration paid for the conveyance of the premises as aforesaid.

The separate answer of Mary Collins denies that said Israel was in any manner induced to make the said conveyances (trust deeds) in order to save the said surety, the said John Frazer, from any loss or damage under the said bond, or by way of collateral security for the same; but on the contrary, this de-

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defendant expressly charges that the said Israel, in the year 1822, possessed himself of \$5,000, or thereabouts, which was the share that this defendant was entitled to of the estate of John M. Matthews, a brother of this defendant, who died in the year 1821 intestate; and this defendant further charges, that in case the said Israel G. Collins, in making the said conveyances in trust as aforesaid, was prompted by other than feelings of natural affection for this defendant and her children, that they must have been made for no other reason than that he might thereby secure some provision and permanent support for this defendant for that portion of her property which said Israel had received upon the distribution of her brother's estate.

Denies that said Israel G. Collins, either at the time of the execution of said two trust deeds, or at the time of his death, was utterly insolvent, but expressly charges, that at the time of the execution of the trust deeds he was connected in business with said Edward K. Collins as commission merchants, under the firm of I. G. Collins & Son. That they were then solvent, in flourishing circumstances, and so continued until the time of the death of said Israel; and that a considerable amount of property still remains in the hands of said Edward K. Collins, the surviving partner. That in addition to this property, he had at the time of the execution of the trust deeds, and also at the time of his death, large claims against the government of France, under the French convention, which claims came into the hands of the public administrator, by whom the same have been presented to the commissioners appointed under the treaty between the United States and France for adjudication and settlement.

Admits she sold the property in New-York, described in the first trust deed, and received about \$1500 therefor.

Admits that Henry M. Western claims some title or interest in the premises in the second trust deed mentioned, by virtue of a certificate made and executed by this defendant, in pursuance of the powers and provisions contained in said second trust deed; but denies that the said Henry M. Western holds,

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or pretends to hold, the same in trust for this defendant; but, on the contrary, saith that said certificate was executed by this defendant in ignorance of her rights, the said Henry M. Western having taken an undue advantage of the relation then subsisting between him and the defendant, (he the said Henry then being her sole legal adviser and counsel,) and thus induced this defendant to execute the said certificate without a full and valid consideration. That she has lately filed her bill of complaint to have said certificate given up and cancelled as void.

Denies that the trust deeds were merely voluntary, and therefore void, or against the conditions of the bond so executed by said Israel G. Collins and John Frazer, but on the contrary, charges that they were given for full and valuable considerations, and were never intended by said Israel G. Collins to be treated as collateral security for or in aid of said bond.

To each of these answers the complainants put in a general replication. The infant defendants, by their guardian, also put in a general answer.

Proofs were taken by J. C. HART, Esq., examiner, on the 17th January, 1837, and subsequently.

Isaac Geery, of the city of New-York, merchant, being sworn as a witness on the part of the complainants, testifies as follows: Did you know the firm of Israel G. Collins & Son, in the city of New-York, and who composed that firm? I did; and it was composed of Israel G. Collins and Edward K. Collins. Were you at any time the book-keeper of that firm, and between what dates? I was, from April, 1824, to the expiration of the firm in 1830; and I afterward continued the book-keeper of E. K. Collins until 1835. Was it not the usage of said firm to state an account with each partner at the end of each year, showing how his interest stood in the firm? It was. Look at the ledgers and other books now produced and shown to you. Are they the ledgers and books of said firm? They are; they consist of ledger A; journals A, B & C; cash-books 1 and 2; day-books 1 and 2; letter-books 1 and 2, and bill-book. These books are marked by the examiner A, B, &c., to K. Look at the books for the year 1826, and state

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how the balance stood at the end of that year, viz.:—on the first of January, 1827; was it or not in favor or against the said Israel G. Collins? It was against him \$987.79. What was the character of the preceding year 1825–6, in relation to the said firm; was it prosperous or adverse? Adverse; very much so—so much so, that they talked of discharging me on account of their misfortunes. Look at the books for the year 1827, and state how the balance stood at the end of that year, namely, the first of January, 1828; was it or not in favor of or against the said Israel G. Collins? It was against him \$369.31. When was the said partnership dissolved? I think it was in May, 1830. Look at the books for each of the intermediate years, from the first of January, 1828, until the dissolution of said firm, and state how the balances stood each successive year with reference to the said Israel G. Collins, until such dissolution? On the first of January, 1829, the balance was against him \$496.84; on the first of January, 1830, the balance was against him \$927.65; on the first of May, 1830, the balance was against him \$1,581.65. Did you then, or do you now know of any means which the said Israel possessed to pay said balances? No, sir. Who supported the said Israel and his family after such dissolution of the said firm? Edward K. Collins paid his board, and his clothing, &c., and other expenses, or bills that came in against his father. I cannot state positively that he was entirely supported by Edward K. Collins. How did you come to the knowledge of these facts? By paying his board-bills at the Asylum, and for articles of clothing. Did you hear any conversations on this subject between the said Israel and the said Edward K. Collins? I have heard Edward K. Collins tell his father to order clothes and he would pay for them; and that if he would leave his wife, he would support him and his family. When did Israel G. Collins die? I think it was in November, 1831. Of what disease did he die? He was drowned. What were his habits as to temperance; and how long before the dissolution of the firm did such habits manifest themselves? He was occasionally intemperate from the time I first went with him,

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and it increased until the time of the dissolution, and so continued until his death. Was the said Israel at any time, from such habits, in the Lunatic Asylum; and who paid his expenses there? He was; and his expenses were paid by Edward K. Collins.

Sylvanus Miller was the next witness sworn for the complainants. His testimony, in substance, was, that in the year 1830, administration of the estate and effects of Israel G. Collins was committed to him; that he never had any property of any kind under his possession or control, nor did he know of any belonging to the estate of said I. G. Collins. Never received any assets belonging to the estate.

William H. Munn, the next witness sworn for complainants, proved that in 1826 and 1827 Israel G. Collins occupied a house in the city of New-York, belonging to the father of witness, who had to prosecute Collins for a quarter's rent due May, 1827, and obtained judgment; but had never been able to find any property of Collins to collect it.

The complainant here rested; and the defendant, H. M. Western, offered testimony.

Alexander Kursheedt, a witness produced and sworn on the part of the defendant, H. M. Western, testifies as follows:

I reside in the city of New-York, and am an attorney at law. Were you in Mr. Western's office at the time the lands in question were purchased by Mr. Western of Mrs. Collins? I was. In what year was that? In the year 1832 or 1833. What was the consideration of that sale by her? \$1,400 in cash, a satisfaction of a judgment in the supreme court, and some receipt or discharge of a bill for advice as counsel. Was there not, in addition to that, a delivery of some papers to her? There was. In this sale, at what was the whole value of that property estimated? It was considered by her, according to my recollection, as equivalent to \$2,100. Had not Mr. Western, at the time of this sale, and for some time previous, ceased to be her counsel? I did not know that she bore the relation of a client to him at that time; and I, at that time, was a partner in part of his business. Did you soon, and how soon

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after, attempt to make a sale of this very property on Mr. Western's account,—to wit, the property purchased by him of Mrs. Collins? It was prior to the 13th day of May, 1833, Mr. Western contemplating the purchase, that I endeavored to make a sale of the property in question to a person by the name of Patten, residing adjoining the property. He offered for it \$2,500. It was difficult to raise at that time \$1,400 in cash, which was necessary to effect the purchase of Mrs. Collins. I think Mr. Patten could not raise the money; at all events, the negotiation with him fell through. Patten offered but \$2,500 in promissory notes, at different dates, to be secured by mortgage, as I think: pending this negotiation with Patten, Mr. Western raised the money by mortgage on other property, and concluded the purchase. Had Mr. Patten been willing to have raised \$1,400 in cash, and to have secured the rest within a short period, Mr. Western would have sold it to him. I considered it a good purchase for Mr. Western; and I thought it a good sale for her, inasmuch as she received \$1,400 in money, which she seemed to be sadly in want of, and was very anxious to get. I saw the money paid, to wit, \$1,400, by Mr. Western to her.

William C. Boardman, a witness produced and sworn on the part of the defendant, H. M. Western, testifies as follows:

Have you seen Mrs. Mary Collins, one of the defendants, lately? I called with Mr. Western on Mrs. Collins on the 14th of June instant. What was the cause of your calling on her? Mr. Western having received a letter from her of the following tenor:—it urged Mr. Western to call on her, in relation to the lands in controversy in this suit. Upon calling, what took place? Mrs. Collins said that she had sent for Mr. Western, as she wished that justice should be done in regard to the land he had purchased of her, and that he should be relieved from the suits pending in chancery in regard to it, or words to that effect: she said in the course of the conversation, that Mr. Western had fairly and honorably bought the land of her, at her repeated request, and when no other person would take the title she could give. She also said that she had

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thought much upon the subject during her illness, and that she had determined that justice should be done him, as far as in her power to effect it. She also remarked that she would do any thing that she could to effect that object. She stated in regard to the suits in chancery, that they were brought without her knowledge or consent, and she was not aware of them until after they were brought, and only learned it accidentally. She said that she believed they were brought by Edward K. Collins for his own benefit, and with the view of getting the land unjustly for his own benefit. She also said that if Frazer knew of the suit at all, she believed that he had only allowed his name to be used by Mr. Collins for his, Collins's, own benefit, and gave as a reason for that, that Mr. Frazer's liability on a certain bond was settled by the decision of a court in South Carolina, where she had sued Frazer on this bond, and the suit was decided in his favor; and that information could be had upon the subject by application to Mr. Pettigrew, Mr. Frazer's attorney, by any disinterested person. Did she or not disclaim Mr. Western's being her counsel at the time of the purchase, and also that he had used any undue influence over her? She spoke of having left Mr. Western, and of employing other counsel; and she said no undue influence had been used; on the contrary, that she considered it a very friendly or kind act of Mr. Western in having taken the land of her at the time. What was her condition as to health when you called? She said she was better than she had been; but she appeared to me to be in extreme ill health; and I remarked after leaving her, that I thought she could not live but a short time. She appeared, however, to comprehend perfectly well all that was said to her, and all matters relating to business that were mentioned.

Isaac P. Martin, a witness produced and sworn on the part of the defendant, H. M. Western, testifies as follows:

Was you a clerk with Mr. Western at the time of the purchase by him of the land in dispute of Mrs. Collins? I was. What time was it? In May, 1833. How old were you then? About seventeen years old. Was you privy to the purchase of

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this land on Staten Island, that she sold to Mr. Western? I knew that she was anxious to sell the land, and that he afterward purchased it. Which party sought the other? She came to Mr. Western's office frequently. Were they then, and had they not previously been on bad terms? Yes, I believe they were. Mr. Western had brought a suit against her for his costs. Do you remember whether or not Mr. Western was unwilling to have any negotiation with her in relation to the land, and declined it in the first instance? I don't recollect that such was the fact, although I have no doubt that it was so. It is my impression it was so. Was you present when Mr. Western paid her the money? I was. Was she attended by any body as her adviser when she received that money? I think she was. I do not recollect his name. The witness adds these words:—From what I saw of the transaction she appeared to be desirous of selling, and the matter appeared to be done in the ordinary course of business, without any compulsion on the part of Mr. Western, and from information that I got at the time the full value of the property was given to her by Mr. Western.

Cornelius V. S. Kane was the next, and last witness sworn for defendant, Western. He testified that he was an attorney at law, and resided in the city of New-York; that in October, 1832, he was retained by Mrs. Collins to defend a suit brought against her by Henry M. Western as plaintiff, for fees as attorney. After putting in a plea of the general issue, and filing an affidavit of merits, was not instructed to make any further defence.

The deed of trust from Israel G. Collins to Edward K. Collins, bearing date August 7, 1828, of the Staten Island property, and the deed from Mrs. Mary Collins to Henry M. Western, of the same premises, bearing date May 13, 1833, were then offered and read in evidence.

The evidence on both sides here closed.

On the 18th November, 1841, MURRAY HOFFMAN, Esq., assistant vice-chancellor of the first circuit, after giving an elaborate and able opinion, (1 *Barb. Ch. R.* 220,) made the following decree:—

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“It is hereby declared, ordered, adjudged and decreed, that the conveyance in the pleadings mentioned from Israel G. Collins to Edward K. Collins, dated the seventh day of August, in the year one thousand eight hundred and twenty-eight, of the premises at Staten Island, particularly described in the pleadings, is void as to the complainants and all others, the creditors of Israel G. Collins deceased, whose debts shall be proved before and allowed by the master on the reference hereinafter directed; and it is further ordered, adjudged and decreed, that it be referred to William W. Campbell, Esq., one of the masters of this court, residing in the city of New-York, to call in the creditors of Israel G. Collins, deceased, to prove their claims, and that the said master state the nature and priority of the debts so proven before him according to the provisions of part 2, title 3, chapter 6, art. 2, of the revised statutes, with all convenient speed, and that for the purposes of this reference, the bill of complaint in this cause be answered by making the same applicable on behalf of the complainants and all the creditors of Israel G. Collins, who may come in and contribute to the expenses of this suit, according to the practice of this court.

“And it is further ordered, adjudged and decreed, that the premises in the said deed mentioned be sold under the direction of one of the masters of this court, and a proper deed be executed by the master to the purchaser thereof; and the proceeds be brought into this court, to be distributed according to said report among the creditors of the said Israel G. Collins, upon the further order of the court in the premises.

“And it is further ordered, adjudged and decreed, that upon payment out of the said proceeds of all the debts due and owing by said Israel G. Collins, that H. M. Western be subrogated to the rights of said I. G. Collins and his heirs, so far as to authorize him to file a bill in this court to vacate the sale made by said Mary of the premises in the first deed mentioned.

“It is also further ordered, adjudged and decreed, that the costs of the infants, and of the public administrator, be paid out of said proceeds, before distribution, to the date of this decree, but that no further costs be allowed therein, their in-

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terference in the court being unnecessary. All other questions as to costs and distribution to be reserved until the coming in of the master's report."

Western appealed from this decree to the chancellor, who, on the 8th December, 1845, reversed the decree of the assistant vice-chancellor, (*see his opinion*, 1 *Barb. Ch. R.* 235,) in the following form :

"It is declared, and the chancellor doth declare, that the conveyance of the premises on Staten Island, from Israel G. Collins to Edward K. Collins, dated the seventh day of August, one thousand eighth hundred and twenty-eight, mentioned in the said pleadings, is not against the said Henry M. Western fraudulent and void in respect to any of the creditors of the said Israel G. Collins; and that the conveyance of the said property from Mary Collins to the said Henry M. Western is valid. And, therefore, it is ordered, adjudged and decreed, and the chancellor, by virtue of the power and authority in him vested, doth order, adjudge and decree, that the said decree of the assistant vice-chancellor of the first circuit be, and the same hereby is accordingly in all things reversed; and it is further ordered, adjudged and decreed, that the bill of the said complainants be, and the same hereby is accordingly dismissed from, and out of this court. And it is further ordered, adjudged and decreed, that the said complainants pay to the said defendant, Henry M. Western, his costs of this suit, and also the costs of the said appeal to be taxed; and that the said Henry M. Western have execution for his said costs against the said complainants.

"And it is further ordered, that the proper order be made in this cause, directing the complainants to pay to the guardian, *ad litem*, of the infant defendants, their costs to be taxed, and disposing of all questions of costs as between the complainants and the defendants, other than the said Henry M. Western and the infant defendants. And that the proceedings be remitted to the vice-chancellor of the first circuit, to the end that this decree may be carried into full execution.

The complainants appealed from the decision of the chan-

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cellor to the court for the correction of errors. Western, and also the infant defendants, by their guardian, put in their answers to the petition of appeal. The cause, by operation of law, was transferred to the court of appeals, where it was argued in November term, 1847, in the city of New-York.

John Anthon, Attorney.

Seth P. Staples, and

George Wood, Counsel for appellants.

First. In this case it appears that in the year 1818 Israel G. Collins became the trustee of a sum of money, amounting to between seven and eight thousand dollars, the proceeds of property given by William Matthews to his daughter Mary, then the wife of said Collins, for her use, during her life, and after her decease to go to her children.

Second. To secure this money, Collins gave his bond to one of the officers of the court of chancery of South Carolina, to secure the payment of the interest to his wife Mary Collins, and the principal to her children after her decease; and said John Frazer, one of the appellants, became the surety on said bond.

Third. In the course of the next ten years after the receipt of the said money, said Collins spent the same and all his estate, and became wholly insolvent.

Fourth. While thus insolvent, said Israel G. Collins made the conveyances set forth in said bill of complaint, and alleged to be fraudulent and void, as against creditors.

Fifth. Henry M. Western, one of the respondents in said bill, purchased of Mrs. Mary Collins, after the death of her husband, one of said pieces of land, being the property in question, and now holds the same, and insists that he has acquired a good title thereto. The complainants insist that he made said purchase under such circumstances that acquired no title thereto, as against the complainants. Because they say:—

1. That the proof shows that at the time said Israel G. Collins made said conveyance of the premises in question to his son, E. K. Collins, in trust for his wife, he was wholly insol-

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vent. See the deposition of Isaac Geery, page 41 of the case; Sylvanus Miller, Esq., page 42 of the case; and William H. Munn, Esq., page 43 of the case.

2. If said Israel G. Collins was insolvent at the time he gave the deed and made the conveyance in question, the same is void as against creditors.

To this point it is unnecessary to cite authorities.

3. Henry M. Western obtained no better title from Mary Collins than she obtained by her deed from her husband, as that deed was put into his hands before his purchase; and as other circumstances appear, both from his answer and other proof, sufficient to put him on inquiry as to the validity of her title. (1 *Merivale*, 282; *Smith v. Low*, 1 *Atkins*, 490; *Taylor v. Baker*, 5 *Price*, 306, 311; *Chesterman v. Gardner*, 5 *John. Chy.* 33; *Taylor v. Stibbart*, 2 *Vesey, Jr.* 440; *Daniels v. Davison*, 16 *Vesey*, 249; *S. C.* 17 *Vesey*, 432, 433; 1 *Hoven-den's Notes on Vesey, Jr.* 288, 214; his 2nd *Note on Taylor v. Stibbart*; *Whitehead v. Jordan*, 1 *Young & Coly.* 328; 3 *Sug. Vendors*, 332, pl. 51, cites this case; *Crofton v. Ormsby*, 2 *Sch. & Lef.* 599; *Powell v. Dillon*, 2 *Ball and Beat.* 521.)

☞ Possession of the estate sufficient to put one on inquiry. Previous notice as to claims sufficient to put on inquiry as to what they are. Possession *by tenant is notice*. Possession by tenant is sufficient notice that there was a lease. Possession by tenant is notice of a lease. Possession by tenant is notice of his interest. Purchaser has notice of all under tenants' interests. Tenant in possession full notice, (2 *Ball & Beat.* 521,) a strong case. Examine chancellor's opinion. The deed to E. K. Collins was placed in Western's hands, and it was quite sufficient to put him on inquiry. ☞

4. The complainants come properly before the court, and are entitled to relief.

☞ G. Wood in reply. Bill double aspect. 1. Conveyance on account of wife's money received; if not, 2. Then voluntary and fraudulent against creditors.—First ground defendants repudiate, and so we are obliged to go on the second.—Then two questions. 1. Is it fraudulent and void as against

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creditors? 2. Was there enough to put Western upon inquiry? I maintain affirmative of both.

Western got only an *equitable*—not legal estate—and we as creditors had the *prior* equity. (*Atherly Mar. Settl.* 212, enough to put on inquiry, 2 *Vern.* 384; 1 *Hare*, 56; 12 *Ves.* 113; *Amb.* 313; 2 *Sch. & Lef.* 599; 1 *Meriv.* 282; 16 *Ves.* 249; 1 *Atk.* 490; 6 *Bing.* 118; 13 *Ves.* 113; 2 *Paige*, 205.)

This is not an executed trust—is an active trust. 

H. M. Western, respondent in person, and
Wm. Beach Lawrence, and
Charles O'Connor, Counsel for respondent.

First. By the conveyance from Israel G. Collins to E. K. Collins, of 7th August, 1828, in trust for the use, benefit and behoof of Mary Collins, her heirs and assigns forever, Mrs. Collins acquired by the operation of the revised statutes, if not before, an absolute legal estate in fee in the premises. (See *deed, case*, 52, 53, 1 *R. S.* 727, § 47. *In the matter of Decay*, 4 *Paige*, 404. *Chancellor's opinion, case*, 77, 78, 79.)

Second. The answer of the respondent Western, (which is not only responsive to the bill, but the truth of which is expressly admitted by the complainant's stipulation,) as well as the proofs taken in the cause, shows that he was a purchaser from Mrs. Collins in 1833, and after the death of her husband, for a valuable consideration, and which was actually paid without notice of any matter to induce him to question the validity of Mrs. Collins's title. (*Case, pp.* 24, 25, 36, 44, 47, 48.)

Third. There was nothing on the face of the deed of trust as in the cases cited by the assistant vice-chancellor (*case*, 67, 68) to induce suspicion; nor would the fact of the consideration mentioned therein being nominal, been constructive notice to Western that the grantor in the said deed was insolvent, or that it was made to defraud creditors, if such had been the case. (*Sigourney v. Munn*, 7 *Conn.* 333; *Kennedy v. Green*, 3 *Myl. and K.* 699; *Taylor v. Baker, Daniels*, 71; *Booth v. Barnum*, 9 *Conn.* 289; *Hawley v. Cramer*, 4 *Cow.* 717; *Green v. Slayter*,

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4 J. C. R. 47; *Pendleton v. Fay*, 2 Paige, 204; 2 R. S. 137, § 4; *Chancellor's opinion, case, p. 76.*)

Fourth. The decree of the A. V. C. in allowing the subrogation of Western to the rights of I. G. Collins and his heirs, so far as to authorize him to file a bill to vacate the sale of the premises in New-York, is inconsistent with the idea of actual fraud in Western. (*Case, p. 55; Sands v. Hildreth*, 14 J. R. 498.)

Fifth. If the trust deed was fraudulent, Western, as a purchaser from Mrs. Collins, for valuable consideration, without notice, would be entitled to protection even against the claims of creditors intended to be defrauded thereby. (*Roberts v. Anderson*, 18 J. R. 525, reversing S. C., 3 J. C. R. 375; 2 R. S. 137, § 5; 1 R. L. 77, § 6; *Rev. Notes*, 3 R. S. 658, 2nd ed.; *Chancellor's opinion, case, p. 79; 1 Story Eq. J. 646; Bean v. Smith*, 2 Mass. 282.)

Sixth. The conveyance made by the trust deed was not voluntary, but for a valuable consideration growing out of certain property received by Israel G. Collins, on account of Mary Collins, from the estate of her brother, who died in South Carolina, and out of which a court of equity would have made a provision for the wife; and the answer of Western, as well as that of Mrs. Collins, through whom the decree against Western must be made, both of which are responsive to the bill, denies that it was voluntary. (*Mumford v. Murray*, 1 Paige, 620; *Smith v. Kane*, 2 Paige, 303; *Van Epps v. Van Deusen*, 4 Paige, 64; *Glen v. Fisher*, 6 J. C. R. 36; *Howard v. Moffat*, 2 J. C. R. 206; *case, pp. 26, 30, 31; Chancellor's opinion, case, 76.*)

Seventh. If voluntary, it is not therefore void, but in all cases arising under the statute of fraudulent conveyances, the question of fraudulent intent is a question of fact to be determined from the circumstances attending the transaction, and though the consideration be nominal or founded on natural love and affection, mere indebtedness is not a ground for avoiding a conveyance, even according to the cases cited by the assistant vice chancellor were they applicable, which they are not. (*Seward v. Jackson*, 8 Cow. 407; *Van Wyck v. Seward*, 1 Ed. 327; S. C. 6 Paige, 62; S. C. 18 Wend. 406; *Jackson v. Peck*, 4 Wend.

300; *Jackson v. Timmerman*, 7 *Wend.* 436; 2 *R. S.* 137, § 4; *Rev. Notes*, 3 *R. S.* 658, 2nd ed.; *Hinde's lessee v. Longworth*, 11 *Wheat.* 199; *Townsend v. Westacott*, 2 *Beavan*, 340; *Shears v. Rogers*, 3 *Barn. & Ald.* 362; *Bonney v. Griffith*, *Hays*, 115; *Lush v. Wilkinson*, 5 *Ves.* 384; *Kidney v. Coussmaker*, 12 *Ves.* 152; *Halloway v. Millard*, 1 *Mad.* 414.)

Eighth. It is the state of the grantor's circumstances at the time of making the conveyance, not at a subsequent period, or at the time of his death, which is to affect the validity of a conveyance. (*Seward v. Jackson*, 8 *Cow.* 407; *Van Wyck, v. Seward*, 6 *Paige*, 67, *aff'd* 18 *Wend.* 375.)

Ninth. There is no evidence that Israel G. Collins was insolvent at the time he made the trust deed; but it is denied by the answers responsive to the bill of Western and Mrs. Collins. (*Case*, pp. 12, 16, 23, 26, 31.)

Tenth. The bond executed in South Carolina was not payable at the time of the execution of the trust deed, and even if it should be deemed technically a debt within the contemplation of the statute of fraudulent conveyances, all inference of fraud is rebutted by the fact that the parties beneficially interested in the bond and trust deed were the same individuals, viz., the wife and children of Collins.

Eleventh. Whatever the claim of creditors might be, the complainants show no right to file this bill against any of the parties to the suit, much less against the respondent Western.

1. There is no allegation of any breach of condition, or the occurrence of any event by which the bond was forfeited. The interest or income had been regularly paid to Mrs. Collins, who was still living. (*Case*, pp. 6, 8, 9; *Bill*, fol. 2, 9, 12, 13.)

2. Frazer, the surety, was not entitled to bring a suit even against Collins or his representatives, till he had paid the debt, or been actually damnified, much less could he do so till the debt was legally due. Nor do any of the cases cited by the assistant vice chancellor authorize such proceedings in a case like the one before this court. (*Ranelogh v. Hayes*, 1 *Vern.* 189; *Cook v. Ravie*, 6 *Ves.* 283; *Lee v. Rook*, *Moseley*, 318;

Campbell v. Macomb, 4 J. C. R. 534; *Code Civil*, art. 2032; *Aberdeen v. Blackman*, 6 Hill, 324; *Birge Suretyship*, 374.)

3. There was no judgment obtained by the complainants against Collins, in his life time; and, according to the English law, conveyances of land cannot be set aside for fraud, except by creditors, who have reduced their debts to judgments, before the death of the parties making them. In the United States the rights of creditors as to such conveyances are derived from local statute, and there is no statutory provision for such cases in this state. (1 *Story Eq. Jur.*, §§ 375, 376; *Parslow v. Weadon*, 1 *Eq. Ab.* p. 7; 1 *Fonb. Eq. B.* 1, C. 4, §§ 12, 14; *Drinkwater v. Drinkwater*, 4 *Mass.* 354; *Wildbridge v. Patterson*, 15 *Mass.* 148; *Mass. R. S.* 454, § 11.)

Twelfth. There was nothing in the relations of counsel and client, had they existed, that would have prevented the respondent Western from making the purchase in question, on the terms on which it is proved to have been made, from Mrs. Collins. The relations of counsel and client between Western and Mrs. Collins had, however, ceased long before the purchase; but had the purchase been voidable on account of the supposed relations, the objection could only have been taken advantage of by Mrs. Collins, or by a party claiming under her, and could not avail the complainants; nor is this matter made a ground for relief in the bill. (*Case*, 45, 46, 47, 48; *Kenny v. Brown*, 3 *Ridg. P. C.* 462.)

☞ No question made on the twelfth point on the other side. ☞

Thirteenth. It was not competent for the assistant vice chancellor to allow the complainants to amend their bill, the primary object of which was to declare the trust deeds collateral security for the payment of the South Carolina bond, at the hearing of the cause, and to proceed to a decree, as on a creditors' bill on behalf of the complainants and others, without giving to the defendant Western an opportunity to answer the new and totally different case made by such amendment. (*Chancellor's opinion*, case, 74; *Mitford's Pl. by Jeremy*, 331, n. a; *Story's Eq. Pl.*, §§ 886, 891, 904; 3 *Dan. Chy.*, p. 1654; *Goodwin v. Goodwin*, 3 *Atk.* 370.)



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Fourteenth. Nor could the bill have been, at any stage of the proceedings, amended in the manner directed by the assistant vice chancellor; nor could such a bill, if amended, have been sustained.

1. When a bill is filed by one or more creditors on behalf of himself or themselves, and of all others who may come in and contribute to the expenses of the suit, the nature of the proceeding should appear on its face. (*Brown v. Ricketts*, 3 J. C. R. 556; *Leigh v. Thomas*, 2 Ves. 313.)

2. Since the revised statutes, it is no longer allowable for a creditor to file a bill against the personal representatives and heirs or devisees of a deceased debtor jointly for the purpose of compelling payment of the debt, nor is the decree as formerly for a sale of the real estate and the distribution of the proceeds thereof among all the creditors, who may come in under the decree, but each creditor must file a bill for what the heirs or devisees are liable to pay him. (*Betts v. Genung*, 5 Paige, 256; *Leonard v. Morris*, 9 Paige, 93.)

Fifteenth. The complainants do not aver in their bill that the deeds of Israel G. Collins were made "with intent to defraud, hinder, or delay creditors;" nor are the facts averred conclusive evidence of such intent. (*Cunningham v. Freeborn*, 11 Wend. 240.)

 *Charles O'Connor*, same side. (11 W. 224, 240; 4 Hill, 652; 8 C. 422; 2 Hov. Fr. 76; 1 Hare Ch. R. 43—V. C. WIGRAM; 2 Vern. 599; *Cornish Uses*, 58.) 

The following opinion was delivered for affirmance:—

JEWETT, Ch. J. I am of opinion that the decree of the chancellor should be affirmed. Western shows that he is a *bona fide* purchaser for a valuable consideration, without actual notice of the insolvency of I. G. Collins at the time he conveyed the premises to E. K. Collins in 1828 in trust for his wife and children, and to be conveyed by him according to her appointment. There is no ground to subject Western to the consequences of a constructive notice of the insolvency of I. G. Collins in August, 1828, although he saw the trust deed, and could see that it was voluntary, made upon a nominal con-

sideration—that fact alone would not necessarily or naturally lead him to the inquiry or ascertainment of the fact of the insolvency of Collins at the time of executing the deed.

There is no evidence that Western had any acquaintance with the person of I. G. Collins, or of his pecuniary circumstances, or that their situation was such as would probably lead Western to ascertain them.

The following opinion was delivered for reversal.

BRONSON, J. This case has been fully considered in the court of chancery; (1 *Barb. R.* 220;) and as the chancellor and assistant vice-chancellor have only differed upon a single point, I shall do little more in relation to the other questions in the cause than to state the conclusions at which I have arrived.

1. This is a bill with a double aspect; but as one of the grounds on which the complainants proceeded was denied by the answers, and has not been supported by proof, it is only necessary to consider the case in the remaining aspect of a bill to set aside a conveyance as being a fraud upon creditors.

2. The complainant Gibbs, the master in equity, to whom the bond of Collins was executed in 1818, or Freeman, the successor in office of the obligee, who is also party complainant, must be regarded a creditor of Collins to the amount secured by the bond. It is unnecessary, therefore, to inquire whether the bill could be maintained by the other complainant, Frazer, who was the surety for Collins.

3. I have been unable to read the evidence without coming to the conclusion that Collins was insolvent at the time he executed the trust deeds to his son in 1828, and that he continued to be insolvent until the time of his death in 1831. There was no attempt to answer the proofs of the complainants upon that point.

4. The trust deeds were not made in pursuance of an antenuptial agreement, nor upon any valuable consideration; but were voluntary conveyances, made for the benefit of the grantor and his family, and were clearly fraudulent and void as against those who were then creditors of the grantor.

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5. As Collins was dead, it is quite obvious that the creditors who filed this bill could not reach the property in the usual way of a judgment and execution against the fraudulent grantor; and they were consequently at liberty to go into chancery for the purpose of setting aside the fraudulent conveyance, and having their debt paid out of the property.

6. The bill should have been filed on behalf of the complainants *and all the other creditors* of Collins who might come in and prove their debts and contribute to the expenses of the suit. But this is an objection of mere form, and not of substance, which might be cured by amendment; and as the amendment would not make a new case, or one to which there could be any different answer on the part of the defendants, I see no reason why it might not be allowed at the hearing.

7. If the legal estate under the trust deeds still continued in the trustee, it follows that Mrs. Collins, the *cestui que trust*, only conveyed an equitable interest in the Staten Island property to Western; and then, as the complainants have the prior, and consequently the better equity, their claim must prevail. Western cannot protect himself on the ground of *bona fide* purchase for a valuable consideration without notice.

But as it is not material in the view which I entertain of the case to examine that question, I shall assume that by virtue of our statute of uses and trusts the equitable interest which Mrs. Collins had at the first in the property, was turned into a legal estate on the death of her husband in 1831; and, consequently, that Western, who purchased from her in 1833, is in a condition to set up the defence on which he relies; and if, in truth, he is a *bona fide* purchaser without notice, in the legal sense of those terms, the defence must prevail.

8. That Western paid a valuable consideration for the land is admitted; and there is no proof that he had actual notice of any defect in the title of his grantor. This brings us to the principal question in the cause, which is, whether Western had constructive notice that the trust deed through which he claims title was fraudulent and void as against the creditors of Collins.

On this point I am unable to agree with the chancellor. It

should ever be borne in mind that the plea or defence of a *bona fide* purchase without notice is only resorted to where the vendee is under the necessity of claiming a better right than his grantor had to convey; and where, if the defence succeeds, some innocent person must suffer damage. For this reason the defence, though a very good one in a proper case, should always be received with great caution. It is not enough that the purchaser may be wholly free from the charge of actual fraud, although he may not have had express notice of any latent equity or defect of title, still if any matter came to his knowledge pending the negotiation which was calculated to awaken attention, and put an honest man of ordinary caution upon inquiry, the law charges him with notice of every fact which the inquiry would probably have elicited. It is the settled doctrine of courts of equity, that whatever is sufficient to put a party upon inquiry, is constructive notice to such party, and will as effectually deprive him of the character and standing of a *bona fide* purchaser as though he had express notice. And especially is he bound to inquire when the facts are such as to point him to the proper source for obtaining information. Whenever such a case arises before the sale is consummated, the purchaser is bound by a just regard for the rights of others to stop and seek information; and if he neglect to do so, it is, and should be at the peril of being charged with the knowledge of those facts which, in the exercise of reasonable and proper diligence, he might have ascertained.

The doctrine of implied notice was laid down by baron ALDERSON, in *Whitbread v. Jordan*, (1 *Younge & Collyer*, 303, 328,) in these terms:—"I apprehend that when a party, having knowledge of such facts as would lead an honest man, using ordinary caution, to make further inquiries, does not make, but, on the contrary, studiously avoids making such obvious inquiries, he must be taken to have notice of those facts which, if he had used such ordinary diligence, he would readily have ascertained." And in *Kennedy v. Green* (1 *Mylne & Keene*, 609) the rule was thus stated by lord BROUGHAM:—"Whatever is notice enough to excite attention, and put the party on his

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guard, and call for inquiry, is also notice of every thing to which it is afterward found that such inquiry might have led, although all was unknown for want of the investigation." It is upon this principle that when one purchases an estate which is in the occupation of a tenant of the vendor, he is deemed to have notice not only of the lease and its contents, if there be one, but of all the interest which the tenant may have in the property, though it be of a character which does not at all belong to the relation of landlord and tenant. Knowing that there is a tenant in possession of the land, it is the duty of the purchaser to seek him and make inquiry; and if he neglect to do so, it will be at the hazard of being held cognizant of all the facts which the inquiry would have revealed. (*Taylor v. Stibbert*, 2 Ves. 437; *Daniels v. Davison*, 16 Ves. 249; 17 *id.* 433, S. C.; *Crofton v. Ormsby*, 2 Scho. & Lef. 583, 599; *Powell v. Dillon*, 2 Ball & Beatty, 416; *Chesterman v. Gardner*, 5 John. Ch. 29; *Meax v. Maltby*, 2 Swanst. 281; *Allen v. Anthony*, 1 Merivale, 282.) This rule is subject to some qualifications; but they are not such as affect the present question.

In *Moore v. Bennett*, (2 Chan. Cas. 246; 1 Eq. Cas. ab. 331, pl. 7, S. C.; and see 2 Vern. 385, note 4,) the purchase was made from one who held under a deed containing a power of revocation by will, which power had been executed by devising the property to a third person; and although the purchaser under the deed knew nothing of the will, he was intended to have notice of it as well as the power to revoke. As he knew of the power to revoke, it was his duty to inquire whether it had been executed. And the court laid it down as a principle, that where the purchaser can not make out a title but by a deed, which leads him to another fact, he shall be presumed cognizant of that fact; for it is *crassa negligentia* that he sought not after it. This doctrine was approved and followed by lord HARDWICKE in *Mertins v. Jolliffe*, (Amb. 311,) and I am not aware that it has ever been questioned.

In *Ferrars v. Cherry*, (2 Vern. 383; 1 Eq. Cas. Ab. 331, pl. 5,) the vendor had previously made a post-nuptial settlement, under which he had only a life estate; his wife had a

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jointure, and his son the remainder in fee. The settlement was in truth supported by an ante-nuptial agreement; but as that fact was not recited in the deed, and the vendee had no knowledge of it, he acted upon the assumption that the settlement would be void against him as a purchaser, as it would have been without an agreement for the settlement prior to the marriage. But the court held that the vendee had constructive notice that the settlement was supported by ante-nuptial articles; and said, "He ought to have inquired of the wife's relations, who were parties to the deed, whether it was voluntary, or made pursuant to an agreement before marriage." The authority of this case was denied by lord HARDWICKE in *Senhouse v. Earle*, (*Amb.* 285, 289,) but that seems not to have been a well considered remark; for the case was afterward cited by the same learned judge, without questioning its authority, in *Mertins v. Jolliffe*, (*Amb.* 311, 314,) and has ever since been regarded as good law in England. (*Hiern v. Mill*, 13 *Ves.* 121; *Jones v. Smith*, 1 *Hare*, 56; 3 *Sugd. Vend.* 211, *ed.* of 1843.)


Let us now apply these principles to the case in hand. The settlement or trust deed under which the defendant, Western, claims title was, as we have already seen, fraudulent and void against the complainants, or one of them, as creditors of Collins, the grantor; and the question is, whether the creditors shall have the property, or whether the defendant shall hold it as a *bona fide* purchaser without any such notice as should have put him upon inquiry. Let us see how much he knew. He not only claims under the trust deed, but he admits in the answer that it was produced to him pending the negotiation for the purchase; and the certificate or conveyance which he took was annexed to the deed. From the deed itself he learned that it was a conveyance in trust, which did not originally vest any legal interest in Mrs. Collins; and he seems to have supposed that she still had nothing more than an equity. This may be inferred from the form of the certificate or conveyance which he took; and from the fact stated in his answer, that for the purpose of perfecting his title, he presented the

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certificate to the trustee, and requested him to execute a release in pursuance of the trust created by the deed. He also proved a declaration by Mrs. Collins, that he had "bought the land of her at her repeated request, and when no other person would take the title she could give." Although these facts alone would not deprive him of the character of a *bona fide* purchaser, they prove it strange that he should have concluded the purchase without first seeking the trustee, from whom he might expect to learn more about the matter. But this is not all. He saw that this family settlement did not purport to be made in pursuance of any ante-nuptial agreement, but was a mere voluntary conveyance for the benefit of the grantor and his family. The deed was so contrived, under the law of uses and trusts as it then stood, that the legal estate was put beyond the reach of creditors; and at the same time the rents and profits, or beneficial enjoyment of the land, were secured to the grantor during his life time; and after his decease the property was to go to his wife and her heirs or appointees. No one could read the deed—especially no eminent counsellor at law, like Mr. Western—without having his suspicion aroused that it was a device to defraud the creditors of the grantor. If we follow the authorities on this subject, there was enough to put the defendant upon inquiry in relation to the pecuniary affairs of Collins at the time the settlement was made. He should have gone to the trustee, who was the son of Collins, and to whom he was plainly pointed by the deed; and if he could not obtain the requisite information there, he should have gone to others. I can not doubt that a single half hour's inquiry in the city of New-York would have satisfied him that Collins was insolvent when he made the deed, and was soon afterward dependent on his son for support. In omitting to make the inquiry, I do not suppose that Mr. Western actually intended to do a wrong to creditors; for I take him to be incapable of such an action. But he must have intended to take the hazard, whatever it might be, of purchasing with his eyes shut; and he must abide the consequences. Had it turned out that there were no creditors, or they had not appealed to the laws for the purpose of

reaching the property, the defendant would have secured his debt of six hundred dollars against Mrs. Collins, besides getting the land at a moderate price. But in the events which have happened, he has made a bad bargain; for I think the defence can not be supported.

I am of opinion that the decree of the chancellor should be reversed, and that the decree of the assistant vice-chancellor should be affirmed.

 RUGGLES and GRAY concurred in this opinion.


The other five judges were in favor of affirming the decree of the chancellor; but were not agreed on the grounds.

There was no written opinion by the five judges.

JONES, WRIGHT and JOHNSON, thought there was not sufficient proof of the insolvency of I. G. Collins at the time he made the trust deed.

JEWETT, GARDINER and JONES, thought that Western was not chargeable with notice of the insolvency of I. G. Collins.

January 14, 1848. *Decree affirmed.* Five to three.

And so it seems that the case settles no principle. No five, nor even four, of the judges agreed with the chancellor. 

DECISION.—*Decree affirmed.* For affirmance: JEWETT, GARDINER, JONES, JOHNSON and WRIGHT. For reversal: BRONSON, RUGGLES and GRAY.

NOTE.—It seems that the law of this case stands as given in the opinion of the chancellor, (1 *Barb. Ch. R.* 235,) a *majority* of the judges of this court not being able to agree upon the ground or grounds of affirmance. (*It may be useful to refer to the law of CONSTRUCTIVE NOTICE, as contained in the dissenting opinion of BRONSON, J.*)

The chancellor *held*, that the law sanctions a conveyance founded upon the consideration of blood or marriage merely. The legal presumption therefore is, that such a conveyance is valid, and not a fraud upon the rights of any one. The mere fact that the purchaser from the holder of such a title, has notice that it was not founded upon a pecuniary consideration, is not sufficient to make it his duty, at his peril, to inquire whether the title of the grantor was not fraudulent. On the contrary, he has a right to act upon the legal presumption that such a deed of gift, or voluntary settlement was honestly made, until some other fact is brought to his knowledge to raise a suspicion in his mind that the conveyance was intended to defraud some person.

Also *held*, that although there was some evidence in this case which rendered it probable that I. G. Collins was unable to pay his debts in August, 1828, when

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the trust deed was executed; yet there was no evidence that Western, who purchased of Mrs. Collins five years afterward, was acquainted with her husband in his life time, or with his circumstances in 1828, so as to make it his duty to inquire as to the intent of the parties to the trust deed, to commit a fraud upon creditors.

Also *held*, that the legal title of the premises in 1828, under the law then in force, was vested in E. K. Collins, the trustee; and the *cestui que trust*, or her grantee, previous to 1830, had only an *equitable* interest in the property. But under the provisions of the revised statutes, (1 *R. S.* 727, § 47,) this equitable interest was turned into a legal estate in the premises in fee, especially after the death of her husband, and Western acquired the *legal title* to the premises, under the conveyance from Mrs. Collins in May, 1833.

And that since the reversal of Chancellor KENT's decision in the case of *Roberts v. Anderson*, by the court of dernier resort, (3 *John. Ch. R.* 372; 18 *John. Rep.* 515, *S. C.*.) it is no longer an open question in this state, that a *bona fide* purchaser of property from a previous grantee, to whom it had been conveyed for the purpose of defrauding creditors, is entitled to protection against the claims of the creditors, who were intended to be defrauded by the first conveyance.

BRADY, appellant, *agt.* MCCOSKER, an infant, &c., by his next friend, respondent.

Questions discussed.

1. Whether the original bill of complaint, filed in the court below by Thomas McCosker, was *multifarious*, by praying that the will of John McCosker, the younger, be *set aside*, because of incompetency and undue influence, and also praying that if said will be held valid, that *partition* be made of the real estate?

2. If jurisdiction in equity can be entertained in any case of a bill of complaint filed by an *heir at law* to set aside the will of his ancestor for alleged incompetency and undue influence, whether it must not only be where there not only exists a legal impediment to his obtaining redress at law, but where such impediment *has not been created by his act, or that of his ancestor*?

3. Whether any *impediment* existed to the right of Thomas McCosker to bring ejectment, such as would create jurisdiction in equity over this case?

4. Whether John Andrew McCosker, the respondent, who filed the bill in this case, in the nature of a bill of revivor and supplement, being *devisee* of his father, Thomas McCosker, (who filed the original bill,) and a *defendant* in the original suit, could revive it, until a decree had been made giving him an interest in its continuance.

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5. Whether John Andrew McCosker was prevented by any legal impediment from bringing a suit in ejectment?

6 Whether James T. Brady was improperly made a party to this suit?

This was an appeal by James T. Brady from a decision of the chancellor, affirming the decision of the vice-chancellor of the first circuit, overruling a demurrer to the complainant's bill.

John McCosker, the elder, died on the 26th of March, 1839, seized of certain real estate in the city of New-York, particularly described in the bill of Thomas McCosker, hereinafter mentioned, leaving his two sons, John McCosker, the younger, and Thomas McCosker, his only children and heirs. By his will, made in 1834, he directed his executors, one of whom died in his life time, and the other two afterward refused to accept the trust, to take possession of his real and personal estate, except such as was bequeathed to his wife, and to sell the personal estate and to rent the real estate, and to receive the rents thereof for five years from the time of his death, and apply the same to the payment of his debts and the annuities specified in his will, and to pay over the balance to his son John after the expiration of the five years. He then devised the whole of his real estate, after the expiration of the five years, except a house and lot in Houston-street, which he subsequently disposed of in his life time to his son John during his natural life, with remainder to his issue in fee, and in case his son John should die without issue, then the real estate should go to the heirs of his brother Thomas, who was then residing in Ireland. The testator then gave to his son John an annuity of *two hundred dollars*, to be paid quarterly during the five years. He gave a similar sum to his son Thomas during his natural life, to be paid by the executors quarterly during the five years, and after that time by his brother John or his heirs. This will was duly proved as a will both of real and personal estate, and letters of administration with the will annexed were granted to J. McCosker the younger. At the time of the death of J. McCosker the elder, his only descendants then living were his two sons named in his will, and his grandson, the complainant in the present suit, who was the only child of the testator's

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son Thomas. Thomas McCosker, the brother of the testator, and whose heirs were made the residuary devisees, by the terms of the will, in case of the death of John McCosker, the younger, without issue, was still alive, and had several children and descendants then living, but he and they were all aliens and incapable of taking real estate by devise or descent in this state. And he and they continued to be so incapable at the time of the death of John McCosker the younger, who died in 1843, without issue and unmarried, and without having sold his interest in the real estate of his father, leaving his brother Thomas, and his nephew in the present suit, surviving.

On the 12th of March, 1844, within five years after the death of his father, Thomas McCosker, the son of John McCosker the elder, filed a bill in this court before the vice-chancellor of the first circuit, against the complainant in the present suit, and against Maria L. Brady, J. R. Brady, and J. T. Brady, who are the defendants in the present suit, stating the before mentioned facts. That bill also stated, that in February, 1842, John McCosker, the younger, leased one of the lots in New-York, of which his father had died seized, to C. Maas, for three years from the first day of May, 1842, at an annual rent of five hundred dollars, and that the assignee of Maas was in possession of that lot under such lease, and was paying rent therefor to R. Martin, as agent for whoever was entitled to the same; and that the residue of the lots, of which John McCosker, the elder, died seized, were in the hands of numerous occupants, as tenants thereof, and from whom the rents could not be obtained without the constant attention of some person having all the powers of a landlord to collect the same. That bill further stated that the personal estate of the testator was all disposed of by John McCosker the younger, who, at the time of his death, did not leave sufficient personal property to pay his funeral expenses; and that the complainant in that bill, upon the death of his brother, became entitled to one-half of the real estate of which the testator died seized, as one of the heirs at law of his father, and to the other half thereof as the heir at law of his brother. That bill further stated that

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defendant, J. T. Brady, propounded to the surrogate of New-York, for proof as a will of real and personal estate, an instrument in writing, dated in June, 1842, purporting to be the will of John McCosker the younger, and to have been executed in the presence of two subscribing witnesses, and to dispose of his property as follows: "First, I direct that my debts and funeral expenses be paid as soon as possible after my decease. Secondly, my brother Thomas is entitled, under my father's will, to an annuity of two hundred dollars during his life; I give him in addition an annuity of five hundred dollars during life, and direct that after his death the same amount, that is, five hundred dollars, be annually paid to his son John Andrew for life. Thirdly, I give and bequeath to the Roman Catholic Orphan Asylum of the city of New-York, whatever be its corporate name, five hundred dollars. Fourthly, I give, devise, and bequeath the residue of my estate, real and personal, to John Ricker Brady and Maria Louisa Brady, as tenants in common for ever. Fifthly, if my said brother, Thomas McCosker, or his son, after my decease, shall commence any suit or proceeding to destroy or impair this my will, or any provision or intention thereof, his right to any share or interest in my estate shall thenceforth cease and determine, anything hereinbefore contained to the contrary notwithstanding. Lastly, I appoint Robert Martin and James T. Brady, executors, &c." That bill further stated that Martin refused to act as executor, but that the other executor named in the said pretended will claimed to act as such executor; that Thomas McCosker, the complainant in that bill, opposed the proof of the instrument propounded before the surrogate as the will of John McCosker the younger, and that the question of its validity was still pending and undetermined before the surrogate. That bill further stated, that in consequence of the doubt thrown upon the title of the complainant therein by the said pretended will, his friends, in his absence, and without his knowledge or consent, united with the said J. T. Brady, assuming to act as the friend of the claimants under that pretended will, in requesting Martin to assume the control and management of the

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property, and to receive the rents, as the agent for whoever might be entitled thereto, and that he accordingly assumed such agency, and was continuing to act and to receive the rents of the property as such agent; and that all the objects of the trust term of five years, created by the will of John McCosker the elder, had been satisfied, except as to the annuity of his son Thomas. That bill further charged that John McCosker the younger was, in consequence of intemperate habits and an impaired intellect, under the influence and control of the defendant, James T. Brady, who was his attorney and agent, in relation to the management of his property and the collection of his rents, &c.; and that Brady took an improper advantage of his situation to procure the said pretended will to be made in favor of his own brother and sister, who were in no wise related to John McCosker the younger, either by blood or marriage; and that this alleged will was wholly void; and that he died intestate. That bill further stated, that the lands in question were worth about three thousand dollars a year; that no part of the complainant's annuity had been paid to him since his brother's death, except the one half of the rents of the property which he had received from Martin; that the residuary devisees named in the pretended will were destitute of property; that neither of them was in the actual possession or occupation of the lands in question, or any part thereof, by themselves or tenants, or in the receipt of the rents or profits. The complainant in and by that bill claimed and insisted that the said pretended will was a cloud upon his title, and that it should be declared void by a decree of this court, and that the residuary devisees named therein should be perpetually restrained from asserting any claim to the lands in question under the same; and in case it should be decided to be a valid will, that such complainant was entitled to be paid the arrears of his annuity under the will of his father, and also the annuity of \$500 given to him by the said pretended will of his brother. He also insisted, that in the case last supposed he was seized of one undivided half of the lands in question by descent from his father; and that the residuary devisees in the will of his

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brother were each seized in fee of one quarter thereof under such will, subject to one-fourth of the \$200 annuity given to him for life by the will of his father, and to one-half of the \$500 annuity given to him by the alleged will of his brother; and that no other person was interested in the said lands, except the assignee of the lease for three years given to Maas. And thereupon prayed for an answer without oath; and that a receiver of the rents and profits of the premises might be appointed to take charge of the same pending the litigation; and that the pretended will of John McCosker, the younger, might be declared void, and might be decreed to be delivered up and cancelled, &c.; or in case the same should be held to be valid, that then a partition might be made in such a manner as to protect the equitable rights of the assignee of the lease given by John McCosker to Maas; and that provision might be made for the payment or security of the annuities to the complainant in that bill, and that he might have such further or such other relief in the premises as the nature of the case might require, &c.

The several defendants in that bill being served with process of subpoena, appeared therein; and John Andrew McCosker, the complainant in the present suit, and Maria L. Brady, being infants, put in general answers by their respective guardians; and the defendant, J. T. Brady, demurred to the bill. J. R. Brady put in an answer, in which he admitted that John McCosker, the elder, died seized of the lands in question, and that he devised the same in the manner stated in that bill; that the complainant in that suit was the sole heir at law of his father and brother; and that the contingent limitation over the lands in question, by the will of John McCosker the elder, to the heirs of his brother Thomas, then residing in Ireland, was void. But he denied that the complainant in the present suit was a son of the complainant in that suit, or that the complainant in that suit was entitled to the lands in question, or to any part thereof, by descent or otherwise. He also denied that the alleged will of John McCosker the younger was invalid, but insisted that it was valid, and vested in him and his sister a good title to the whole of the lands in question. A replication to

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that answer was filed ; and a receiver of the rents and profits of the lands in question was appointed under the order of the vice-chancellor made in that suit in April, 1844 ; and the tenants were directed to attorn and pay over the rents and profits of the premises to such receiver. Before any further proceedings were had in that suit, the complainant therein died.

In October, 1844, John Andrew McCosker, who is still an infant, filed his bill in this cause, by his next friend, before the same vice-chancellor, stating the filing of the bill in the before mentioned suit, the charges and allegations contained therein, the prayer thereof, and the proceedings in that suit, and the subsequent death of the complainant therein as before mentioned. The bill in the present suit further stated, that all the matters stated in the said bill of Thomas McCosker were true ; that by the will of the said Thomas, he devised all his real estate to the present complainant,—in which devise was included all the right, title, and interest of the said Thomas, the father of the present complainant, in and to the lands in the former bill mentioned ; and that the matter of proving the said pretended will of John McCosker, the younger, was still pending before the surrogate, and undetermined. The bill in this suit further stated, that by the death of Thomas McCosker the former suit abated ; but that the complainant in the present suit was advised and believed that he, as such devisee, and as sole heir at law of the said Thomas, was entitled to have the said pretended will of John McCosker, the younger, annulled and cancelled, and declared void, &c., as prayed for in the original bill ; or in case the same should be decreed to be valid, then that he, as such devisee and heir of the said Thomas, was entitled to a partition of the premises, and to have the annuity of \$500 secured to him ; and that if such partition could not be had in this suit, that he was entitled to have and receive one-half of the rents and profits of the premises in question from the time of the death of the said Thomas McCosker. He therefore prayed for the relief thus claimed ; and that he might have against the defendants in the present suit the benefit and advantage of the original suit ; and that he might have

such further and additional relief, or other and different relief, as should be agreeable to equity.

James T. Brady demurred specially to the whole bill as follows :—

1. That the said complainant hath not, in and by his said bill, made or stated such a case as doth or ought to entitle him to any such relief as is thereby sought and prayed for from or against this defendant.

2. That the said bill of the complainant being exhibited as a bill of revivor, is improperly so filed; the suit which it is designed to revive having absolutely and totally abated by the death of Thomas McCosker.

3. That the said bill of the said complainant, being filed by the said complainant as heir at law and devisee of the said Thomas McCosker, prays for a partition of certain real estate mentioned therein, although the said complainant is therein stated to be an infant, under the age of twenty-one years, for which reason he is incompetent to pray for or obtain such relief.

4. That the said bill of the said complainant prays for an account of the rents and profits of certain real estate mentioned therein, which accrued before the decease of the said Thomas McCosker, although the said complainant is not stated to be a personal representative of the deceased, nor in any way entitled to such an account in this suit. And because of this prayer in the said bill being united with a prayer for an account of the rents and profits to accrue subsequently to the death of said Thomas McCosker, the said bill is multifarious.

5. That it appears by said bill of complaint, that the same is exhibited by the said complainant against this defendant and John Riker Brady and Maria Louisa Brady for several distinct matters and causes, in many whereof, as appears by the said bill, this defendant is in no way interested; and by reason of such distinct matters, the said bill is drawn out to a considerable length, and this defendant is compelled to take a copy of the whole thereof; and by joining distinct matters together which do not depend on each other, the proceedings in the

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progress of said suit will be intricate and prolix, and this defendant put to unnecessary charges and expenses in matters which in no way relate to or concern him.

6. That the said bill of complaint does not set forth any facts entitling the complainant to any decree against this defendant.

7. That the said complainant, in and by his said bill of complaint, claims in different and inconsistent capacities, and for different and inconsistent reliefs; the said complainant claiming thereby, upon different states of facts, under and against the last will and testament of John McCosker the elder, and under and against the last will and testament of John McCosker the younger, and praying that on one set of facts in said bill stated and contained, the will of the last named John McCosker may be declared void,—and in the event of its being sustained, for relief founded upon its validation.

Wherefore this defendant demands the judgment of this honorable court, whether he shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained; and prays to be hence dismissed, with his reasonable costs in this behalf sustained.

The cause was brought to a hearing on the 30th day of January, 1845, before vice-chancellor McCoun, who ordered that the demurrer be overruled with costs, and that the defendant answer the bill within thirty days.

On the 9th March, 1846, the cause was heard on appeal before the chancellor, who affirmed the order of the vice-chancellor with costs. (*Reported 1 Barb. Ch. R. 329.*)

James T. Brady then brought an appeal from the decision of the chancellor to the court for the correction of errors—which, by operation of law, was duly transferred to this court.

John B. Stevens, Attorney, and

Edward Sandford & James T. Brady, Counsel, for appellant.

First. The original bill of complaint filed in the court below was multifarious.

1. It prays as against the four defendants therein named,

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(to wit: John R. Brady, Maria Lousia Brady, James T. Brady, and John Andrew McCosker,) to have the will of John McCosker the younger set aside because of his alleged incompetency, and of pretended undue influence. (*Johnson v. Johnson*, 6 J. C. R. 163; *Mulock v. Mulock*, 1 Edw. 14; *Pomeroy v. Pomeroy*, 1 J. C. R. 606.)

2. It also prays that if the will be held valid, partition may be made of the real estate of which John McCosker the elder died seized, on the ground that the defendants John R. Brady and Maria Louisa Brady, as devisees of John McCosker the younger, would be tenants in common with John Andrew, of the last mentioned real estate, and as such entitled to one equal undivided half part thereof. (*Story's Equity Pl.*, secs. 254, 271, 284, 530; *Colton v. Ross*, 2 Paige, 396; *Lloyd v. Brewster*, 4 Paige, 537; *Fellows v. Fellows*, 4 Cow. 682; 1 *Milne & Craig*, 603; *Cooper Eq. R.* 30; 2 *Anstr.* 469.)

Thus relief is prayed of two kinds opposite in character, on two states of facts utterly inconsistent with each other, and irreconcilable. (2 *Mason*, 200-1; 5 *Conn.* 86, 91; 1 *Saxton*, N. J. 31, 55.)

3. The complainant also prays relief in different capacities and rights. First, under his father as devisee of John McCosker; second, against the will of the latter; third, as legatee of John McCosker the younger; and fourth, in direct opposition to his will.

4. The bill prays inconsistent reliefs against the defendants, one of whom has no interest in the case as presented in one aspect. It is quite clear that James T. Brady is not a proper party to the partition branch of this suit. (*West v. Randall*, 2 *Mason*, 181; *Stuart's heirs v. Coulther*, 4 *Rand.* 74; *Coe v. Turner*, 5 *Cow.* 86; *Boyd v. Hoyt*, 5 *Paige*, 65; *Marselis et al v. Morris Canal Co.*, *Saxton's Rep.* 31; *Murray v. Hay*, 1 *Barbour*, 64; *Farquharson v. Pitcher*, 2 *Russ.* 87; 1 *M. & S.* 355; 1 *H. Bl.* 110-14; 1 *Saund.* 207, note 2.)

Bill double aspect where different facts tend to same result, or entitled to same relief.

Second. The answer to this objection of multifariousness sug-

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gested in the opinion of the chancellor is founded on error both in fact and in law.

A. Toward the conclusion of his opinion the chancellor says :

“And as the bill contains no allegations or statements which will entitle the complainant to a decree for partition in any event, the *mere prayer* for a partition in an event *contemplated by such prayer only* does not render the bill multifarious.”

The bill contains, exclusive of the mere formal parts, one hundred and twelve folios. The will of John McCosker the elder closes at the 19th folio. The description of his real estate occupies six folios. A lease to Caarsten Maas is fully set forth with an allegation or suggestion at folio 40, that “in case a partition should be prayed as in the said original bill conditionally prayed for, the said demised premises could conveniently be, and in equity ought to be assigned to John Riker Brady and Maria Louisa Brady, or one of them.” Then follows a statement of the supposed interest of Thomas in his father’s estate by descent. Then follow averments respecting the alleged incompetence of John the younger, occupying (exclusive of his will) about fourteen folios. Then the will is declared (at folio 67) to be *wholly void*. At folio 75 the original complainant claimed to have annuity paid under his father’s will, and to have secured on the real estate of John the younger the annuity given in his will. From the 76th to the 85th folios are contained passages relating exclusively to the partition aspect of the suit, and the prayer for partition or sale embraces from the 90th to the 94th folio.

It will be seen, therefore, that the multifariousness is not found merely in the prayer for relief, but that so much of the bill as relates to the partition is distinct and separable from the other parts of it, and composes a large portion of the bill.

B. The chancellor’s remark that the bill is in no respect “properly framed” for a partition, rests exclusively on the fact that the bill alleged the will of John McCosker the younger to be absolutely *void*, and thus shows that John R. Brady and Maria Louisa Brady have no interest in the estate. This (at

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folio 67) is merely a conclusion or averment of law upon the facts respecting the supposed incompetency of the testator, and the fraud alleged to have been practised upon him, most of them stated on information and belief. The will might be sustained, and then there would seem to be no impediment to a partition, unless the objection of multifariousness should be successfully urged at the hearing. There is no pretence that the bill (apart from this averment) does not contain every statement necessary to justify a decree for partition, if John Riker Brady and Maria Louisa Brady were tenants in common with the complainant.

C. The fact that a bill of complaint which confessedly seeks to present two opposite cases, states one of them imperfectly, does not exempt it from objection for multifariousness.

This objection is designed to prevent confusion and prolixity, and is a rule of pleading peculiar to the court of chancery. The reason of the rule is equally applicable, whether both cases be well stated or not. (*Story's Equity, ut supra.*)

D. An exception to the bill for the impertinence of the passages condemned by the chancellor as wholly inappropriate would not have been successful. The complainant could have insisted before the exception master that he meant to claim a partition, and not to proceed on the other branch of the suit. The master could not in that event have stricken out matters appropriate to a bill for partition because other allegations were set forth, inappropriate to such bill. Such an objection would have to be presented on demurrer. No exception could be taken except to the averment that the will of John McCosker the younger was void. If this exception were taken, the complainant could repose on that part of his suit which sought to set aside the will to which the averment would be appropriate. In no event could the master, before deciding on the exception, compel the complainant to *elect* on which branch of his case he should proceed, and this conclusively shows that the objection of multifariousness could only be presented by demurrer.

E. The demurrer to the whole bill for multifariousness was proper. The defendant was entitled to a bill free from multi-

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furiousness, without incurring the hazard of determining before he demurred which of two cases was the better stated.

F. In this connection it is proper to state that the vice-chancellor decided that the bill was a bill for partition, and as such was properly filed; and that this court had confessedly no jurisdiction to entertain a bill filed by the heir at law for the mere purpose of setting aside a will; that the bill in this case contained the proper averments for a bill in partition, and that an infant might file such a bill, the revised statutes not having introduced any new rule on this subject.

Third. The chancellor having determined that the bill of complaint in this suit is to be regarded as a bill filed by an heir at law to set aside the will of his ancestor for alleged incompetency and undue influence, there is no jurisdiction of such a suit in equity. (1 *Story's Equity*, 194, 243, 421-2, 671, *n*; 1 *Fonb. Eq.* 293, notes *a, x*; *Bowen v. Idley*, 6 *Paige*, 46; *Colton v. Ross*, 2d *id.* 396; 4 *Vesey*, 66; 26 *Wend.* 132; 3 *Br. Part.* 362; 1 *Vern.* 76; 2 *Atk.* 324, 424; 3 *Meriv.* 126, 171.)

Fourth. If jurisdiction in equity can be entertained in any case of a bill so filed by the heir to set aside a will, it can only be where there not only exists a legal impediment to his obtaining redress at law, but where such impediment has not been created by his act, or that of his ancestor. If this view be correct, the supposed obstacle to bring ejectment arising either from the trust term created by the will of John McCosker the elder, or the lease executed by his son to Caarsten Maas would not confer jurisdiction in this case. The heir would have a remedy at law only impeded by what is in legal contemplation his own act, and could only proceed to perpetuate the testimony, reserving the action of ejectment until either the trust term or the lease expired.

Fifth. No impediment existed to the right of Thomas McCosker to bring ejectment such as would create jurisdiction in equity over this case.

1. The trust of five years contained in the will of John McCosker the elder was absolutely void, first in directing the

payment over of moneys to Thomas and John; and second, in directing an accumulation of rents and profits not authorized by law.

2. If the trust were valid, yet the fee descended subject to the execution of the trust, and if Thomas had any estate in the land, it was a legal estate between him and all persons not claiming under him or the trustee. He could, therefore, at any time before a trustee had actually taken possession of the property bring ejectment. (*Siglar v. Van Riper*, 10 *Wend.* 414; 2 *R. S.* 306, *sec.* 25; 1 *R. S.* 722, *sec.* 47, 2d *ed.* 723, *sec.* 61; *sec.* 55, *subd.* 4; *Jackson v. Leggett*, 7 *Wend.* 377; *Jackson v. Bakeman*, 2d *Wend.* 570; 16 *Wend.* 152, 156, 161, 170.)

3. The lease to Caarsten Maas was void, if either the trust were valid, or John McCosker the younger were only tenant for life; and as between Thomas and Maas, the latter was wrongfully in possession, and could have been sued in ejectment. (*Ludford v. Barber*, 1 *T. Rep.* 86.)

4. Even if Maas could not have been sued, it does not appear from the bill that the tenants of the other premises had any such exemption. And the validity of the will could have been tested in a suit for any part of the estate.

5. The bill does not allege that the complainant can not bring ejectment, nor suggest that the lease or trust creates any difficulty or confers jurisdiction. The court can not therefore know, that there is not a reason, despite of all contained in the bill, why neither of the supposed obstacles would bear an ejectment.

6. Thomas McCosker avers in his bill that he is in possession of the estate.

7. The objection here taken should be favored, because, by the proceeding at law the defendants who make the objection are entitled to two trials, of one of which this suit would deprive them. And even though two trials should be had, the proceedings at law would be more rapid and less expensive. At law, James T. Brady could not have been made a defendant, which is a good legal reason why it is his right to have this objection strictly enforced.

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Bill sustained on ground of impediments, but now all were removed, and so no ground for this bill.

Sixth. Although the bill of complaint filed by John Andrew McCosker has been denominated by the chancellor an original bill, in the nature of a bill of revivor and supplement, yet he concedes that its substantial effect is to revive and continue the original suit. If, therefore, there were no jurisdiction in equity of that suit, this suit can not be maintained. And whether there were or were not, if John Andrew McCosker could have maintained ejectment he is not entitled to relief in equity.

Seventh. John Andrew McCosker was not prevented by any legal impediment from bringing a suit in ejectment.

1. The trust term which was supposed to obstruct his father's right at law had expired, and its purposes were satisfied before John Andrew had filed his bill.

2. Although a receiver had been appointed in the original suit, it does not appear from the bill that he had done any act in virtue of his office, nor that any tenant of the premises had attorned to him. He had not, therefore, possession of the property so as to exclude John Andrew McCosker, if the latter owned the fee. (1 *Barb. Pr.* 678.)

3. The receivership expired with the original suit, unless John Andrew prayed to have it continued; and if he so prayed, he could not thus, by his own act, create at once an impediment to his legal right, and jurisdiction in equity.

4. At all events, the receivership could, on application in behalf of John Andrew, have been discharged.

Eighth. The original suit absolutely abated by the death of Thomas McCosker. John Andrew McCosker being *devisee* of his father could not *revive* the suit, and being a defendant in the original suit, could not revive it at least until a decree had been made giving him an interest in its continuance.

1. John Andrew can not claim to have filed this bill as *heir at law* of his father. That character is merged in the character of *devisee*. (2 *Barbour's Ch. Pr.* 26; *Souillard v. Dias*, 9 *Paige*, 393; 2 *Barb. Ch. Pr.* 41.)

Ninth. James T. Brady was improperly made a party to this suit, and as to him the bill should be dismissed.

The chancellor assigns but one reason why James T. Brady was "a proper though not a necessary party to the suit," viz., that he is charged with "obtaining a will in favor of an infant who could not properly be charged with the costs of the proceedings to set it aside," and therefore he "might be personally charged with costs in case the claimant should succeed." (*Mitf.* 160; *Smith v. Stow*, 3 *Madd.* 10; 2 *Story's Eq. S.* 1499; *Kitch v. Dalton*, 8 *Price*, 12; *Taylor v. Rochfort*, 2 *Ves. Senr.* 284; *Coton v. Lutterel*, cited in *Dixon v. Parker*, 2 *Vesey Senr.* 223; *Le Texier v. Margravine, of Auspach*, 16 *Vesey*, 164; *Bowles v. Stewart*, 1 *Sch. and Lef.* 227.)

To this the appellant answers:—

1. The bill is in favor of one infant and one adult, so that there is a defendant against whom a decree for costs could be made.

2. No decree for costs against James T. Brady is prayed for in the bill.

3. A party claiming no interest and affirming no right to the suit in progress, or its subject matter, cannot be made a party defendant merely that in case the persons in interest proved to be infants or irresponsible he might be charged with the costs.

4. James T. Brady claims no interest in the suit or its subject matter. If he procured the will to be made, the devisees claim to have it carried into effect, and they alone are the parties to litigate a suit to set it aside.

5. The chancellor, in suggesting that James T. Brady being a proper party to so much of this bill as seeks to set aside the will, should not have demurred to the whole bill, impliedly admits that as to all other parts of the bill said Brady is improperly made a party, and thus shows that his objection to its multifariousness is clearly well taken.

6. The counsel for the complainant below insisted that James T. Brady was a proper party, *first*, for the reason stated by the chancellor in his opinion; *second*, because he had control of the paper directed to be delivered up; and, *third*,

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because being an executor he should be required to answer whether there was sufficient personal estate of John McCosker the younger to satisfy the \$500 legacy.

As to the second of these alleged reasons, the appellant answers :—

A. James T. Brady had no control over the will when this suit was commenced. The bill shows that it was in the possession of the surrogate, before whom the contest of its probate was then progressing.


As to the third alleged reason appellant says :—

A. This reason not being referred to by the chancellor, it is fair to presume that he did not consider it tenable.

B. James T. Brady never was appointed executor, and is not nor could he have been described in the bill as executor.

C. As the suit is adjudged by the chancellor to be merely cognizable for the purpose of trying the validity of the will of John McCosker the younger, there is no pretext for any argument against James T. Brady, founded on the idea that the legacy of \$500 can in any way be considered in this suit.

Tenth. The order of the chancellor should for the reasons above stated be reversed.

 *James T. Brady* in reply to respondent's counsel. Appeal is not too broad, p. 32, only one order made, and my appeal is only from the whole of that. ' No such question ever started before. (1 *Barb. Pr.* 406, 413.) Answer to the petition of appeal waives any formal defect in it. Will construe appeal as applying to the particular case of the party appealing. (3 *Paige*, 478 ; 1 *Barb. R.* 610, 483 ; 8 *Paige*, 548.)

No jurisdiction in chancery for bill by heir at law to set aside will of his ancestor, unless defendant submits himself, or there is an overruling necessity from impediments in the way of a trial at law. Not proper at this time to extend jurisdiction of chancery.

Impediment must be such as to render it *impossible* to proceed at law, and then the special case must be stated on the face of the bill. Not left to be made out by reasoning. (13 *Ves.* 298.)

Not a word in the bill to show they meant to proceed on the grounds that the heir could not sue at law.

Strange bill. Vice-chancellor held it good *for partition*. Chancellor held it good *to set aside a will*. And now no one can tell what sort of a bill it is. Counsel who drew it is here differing from the chancellor and vice-chancellor.

Affirms he has title and holds, and is in full possession. Defendant is not in possession. Then says will is a cloud on his title.

Bill is that he has the whole estate, including seisin and possession, and only complains that we have got a paper which may alarm some one about their title.


Widow must elect within one year whether provision in lieu of dower. (1 R. S. 741, §§ 13, 14.)

Lease to Maas. Made either by tenant for life and ended with his death, or it is a lease under the trust—trust void—and besides, if valid, he had no authority to make it. Not good for half—on their theory lease by one tenant in common of the whole estate with no authority from the other would be good. Suppose valid—lease by their ancestor—took estate subject to lease—no impediment in way of heir; might sue, distrain, &c.

Van Doren v. Mayor of Brooklyn, chancellor approves decision of court of errors.

Story's Equity, § 431, form of demurrer.

Double aspect when the title to relief is the same—but the kind of relief in doubt.

Nothing to show the receiver has ever acted in any way—not a proper party to this bill. 

Charles O'Connor, Attorney and Counsel for respondents.

First. Thomas McCosker, the original plaintiff, was entitled to relief in equity upon the facts stated in his bill.

1. The whole premises were subject to an unexpired trust term; part of the premises was subject to an unexpired lease; and the pretended devisees were not in possession. Any of these three circumstances would prevent an ejectment, and entitle the plaintiff to relief in equity. (*Pemberton v. Pember-*

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ton, 13 *Vesey*, 299, *not in point, but cited for principles*; *Jones v. Jones*, 7 *Price*, 666; 3d *Merivale*, 131; 1 *Scho. & Lefr.* 430; 2 *Vesey, Jr.* 286; *Ambler*, 429; 1 *Atk.* 540; 1 *Chitty's Eq. Dig.* p. 1055, *title Practice, Injunction* 16; *Armitage v. Wadsworth*, 1 *Maddock*, 189; *Meserole, v. Brooklyn*, 8 *Paige*, 209, *not reversed by* 26 *Wend.* 137; *Briggs v. French*, 1 *Sumner*, 505; 1 *Vesey, Jr.*; *Plumber v. May*, 2 *Sch. & Lef.* 369.)

2. The premises were in a peculiar condition. They were held by persons not claiming *under* nor yet *adversely* to any of the parties. A receiver was therefore necessary to prevent irreparable loss, and the case was consequently a proper one for the action of a court of equity. (*Powis v. Andrews*, 3 *Bro. P. C.* 505; 6 *Vesey*, 172; 2 *V. & Beames*, 87, 96; 3 *Atk.* 406; *Calvert on Parties*, 86, 2, 3, 16, *note* 4.)

Second. If the alleged will of John McCosker the younger should be adjudged to be valid, a partition would be proper; and the bill was not rendered multifarious by the prayer for this alternative relief. (*See* 1 *Barbour's Ch'y Rep.* 338, *and cases there cited.*)

☞ General prayer enough. *Story Eq.*, §§ 40, 41, *n.* 2; 1 *Chit. Eq. Dig.* 772; 13 *Ves.* 119; 1 *Atk.* 6. ☞

Third. When John Andrew McCosker, the present plaintiff, acquired his title to the premises, they were in the possession of a receiver appointed by the court of chancery. No ejectment, or other suit at law, could be maintained against such receiver, and equity alone could give relief. (2 *Sim. & Stw.* 96; *Edwards on Receivers*, 12; 2 *R. S.* 185, §§ 118–19; 1 *Danl. Pr.* 344, *Boston ed.*)


☞ Chancery would give as many new trials as the ends of justice might require—would follow the analogy at law, and give at least two trials. Court will direct ejectment to be brought. *Story Eq.* § 440. ☞


Fourth. The defendant James T. Brady is a proper party defendant, in every aspect of the case.

1. If he fraudulently procured the pretended will of John McCosker, the younger, as alleged in the bill, he is chargeable with the costs of setting it aside. (*Bowles v. Stewart*, 1 *Scho.*

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& *Lefr.* 227; 1 *Russ.* 449; *Mitford's Pl.* 161; 2 *Story Eq.*, § 500; *Calvert on Parties*, 230.)

 Said we should have prayed for costs against Brady. General prayer enough, especially as plaintiff is an infant.


No objection in demurrer that we have not prayed costs against him—but looks the other way. (1 *Mit. Pl.* 213.) 

2. He has the possession and custody of the pretended will, and may be decreed to surrender it.


3. He is named executor in the pretended will; and in case the prayer for partition should be entertained, he is a necessary party to the inquiry whether there are any personal assets to pay the \$500 annuity. (*Ram on Assets*, 86; 1 *Simons*, 79; 7 *Paige*, 421; *Ram on Assets*, chap. 6, § 4, and cases cited; *Bootle v. Blundell*, 19 *Vesey*, 494.)


4. Being one of the parties to the previous suit in which the receiver was appointed, he was a necessary party to this suit.

5. As a merely incidental party, not personally interested in the disposition of the property, *he* has no right to object to the forum chosen by the principal parties for the decision of the controversy.

 Is likened to misjoinder of counts at law. In a court of equity is question of convenience—in discretion of the court, 1 *Milne & Craig*, 603; 4 *Cowen*, 710, closing remarks of Col-den; 2 *Howard*, 642; 3 *do.* 411; 5 *do.* 132, may be taken at hearing by the court—not the party.

But the chancellor says our prayer for partition is nugatory; if so, then clearly not multifarious. (4 *Paige*, 537.)

Demurrer for multifariousness must specify. (2 *Anst.* 472; 1 *Dan. Pr.*, *Perkins*, 655.) 

 *C. O'Connor* for respondent.—Devise to John, Jr., for life, remainder in fee to his issue. As John, Jr., had no issue on death of old John, the remainder in fee descended to his two sons, John and Thomas.

Thomas left John Andrew his heir at law.

John, Jr., left a brother Thomas in Ireland.

Either the trust term was good, or John, Jr., owned in fee one-half of the estate, and so lease good for half—and in either

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case there was an impediment in the way of a suit at law, at the time the original bill was filed.

2 R. S. 67, § 66. Effect of proof as a will of real estate. Trust term good, but trust void—proper to go into chancery to have it declared. James's case and Lorillard case.


That for accumulation I admit was void, because for an adult.

To pay debts—doubtful whether that good.

For annuities—good.

22 *Wend.* 483, one good trust enough.

We say annuity, there being no personal estate, was a charge on the land; and Brady as executor of will of John, Jr., is necessary party to answer how it was as to there being personal property. All annuities depend on a single life—that of Thomas—or at most Thomas and Catherine, the wife, and so only two lives.

Annuity to John only for time executors shall hold—though less than five years—"during five years" qualified by what follows. 

DECISION.—*Decree affirmed. For affirmance: GARDINER, RUGGLES, JONES, WRIGHT and JOHNSON. For reversal: JEWETT, BRONSON and GRAY.*

NOTE.—The court, GARDINER, J., delivering the opinion, *held*, that it is the established doctrine of a court of equity, that it will not assume jurisdiction to set aside a will for fraud, or on the ground of the testator's incompetency, where there is a perfect remedy at law, and where the objection to the jurisdiction is taken in season.

That the *impediment* which constitutes the inadequacy of the legal remedy must be stated in the bill. And if it relates *only to a part* of the real estate embraced in the will, it would seem to be sufficient to confer jurisdiction.

That the *trust* established by the will of John McCosker, the elder, (for five years,) was valid; and that the whole estate in law and equity was vested in the trustees. If the trust (which had not expired) was within the statute, *ejectment* would not lie for any part of the premises; if it was not, then it could not be maintained against the assignee of Carston Maas, or against Martin the agent or receiver, by the complainant, who claims as to all the interest in controversy through John McCosker, the lessor. Therefore, *prima facie*, an insuperable obstacle to a recovery at law was presented.

That the complainant succeeded to the rights of Thomas McCosker to relief

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in equity, and was entitled to continue the original suit, if it was properly commenced.

The complainant claimed as *devisee* through his father; he therefore could not file a bill of revivor, but could only have the benefit of the original proceedings, by bill, in the nature of a bill of revivor and supplement.

The objection, that the complainant being a defendant in the original suit, could not revive it until after a decree giving him an interest in its continuance, would be valid, if he sought to revive *as a defendant*; but he claims the benefit of that suit by virtue of his succession to the right of his father, *as plaintiff*. This distinction is sufficient to sustain the bill.

The bill states that the whole legal and equitable estate was vested in trustees, or in the court of chancery, that the assignee of Maas was in possession of the house demised to him, and also who were the *actual occupants* of other parts of the real estate, therefore an averment, by the complainant, that "he then held and was in the lawful possession of said premises," was inconsistent with other parts of the bill, as to the possession and occupation of the premises, unless it be taken as a formal *legal conclusion* from the *facts* previously stated, which must be considered its proper signification.

The bill alleges that the complainant is entitled to all the real estate by inheritance from his father, and John McCosker the younger, and prays for partition. And also, that the will through which alone the defendants claim title to any part of the property is null and void, and prays that it may be set aside. There was no misjoinder of actions; for the bill was not properly framed for partition. Partition implies an interest in different persons in the property to be divided. Therefore, the bill was not *multifarious*, and must be treated as *single*.

James T. Brady was a proper *party* to the bill. He was liable for costs. Maria L. Brady, the infant defendant, ought not to be charged with costs in any event.

The demurrer being to the whole bill, it could only be sustained by establishing a misjoinder of actions, or parties, to which species of multifariousness it was alone adapted.

If the bill was defective in praying for a partition, or contained irrelevant matter unconnected with the case properly presented, the demurrer should have been confined to the parts really objectionable and not extended to the whole bill. It was therefore properly overruled by the chancellor.

Reported 1 Comstock, 214.

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MOEHRING, appellant, *agt.* THAYER, public administrator, &c.,
respondent.

Questions discussed.

1. Whether a married woman, with the consent of her husband, could *by will* dispose of the proceeds of a *policy of insurance* procured by her under the act of 1840, on the life of her husband, for her separate use?

2. Whether such a will can be propounded, admitted to probate, and proved as a last will and testament?

On the 6th day of May, 1840, Isabella Leo Wolf, wife of Joseph Leo Wolf, procured from the New-York Life Insurance and Trust Company a policy of insurance for \$5,000 on the life of her husband for five years. The sum insured was to be paid to her executors, administrators and assigns, for her sole use, within sixty days after due notice and proof of the death of her husband; and in case of the death of the said Isabella before the decease of her husband, the amount of insurance was payable to her children for their use, or to their guardian, if under age.

On the 6th day of March, 1841, Mrs. Isabella Leo Wolf made and executed the following instrument:—

“In the event of the within policy, No. 1321, of the New-York Life Insurance Company, becoming payable by said Company, in consequence of the death of my husband, Joseph Leo Wolf, and in the event of my being at the time when the within policy becomes payable not among the living, it is my wish and will, and I do hereby order and direct that the amount insured in said policy, on the life of my husband, shall be paid over to Doctor Golthilf Moehring, in the city of Philadelphia, state of Pennsylvania, in trust to be held by him for my daughter, Mary Jane Leo Wolf, until her being of age; and in the event of her death before coming of age without issue, I hereby order and direct that the whole amount thus held in trust by said Golthilf Moehring shall be divided in equal parts, and shall be paid over to the children of the brothers and sisters of my husband, Joseph Leo Wolf, living at the time when such division shall take effect.

Moehring *agt.* Thayer.

"Given under my hand and seal, in the city of New-York, this sixth day of March, eighteen hundred and forty-one.

"ISABELLA LEO WOLF.

"Witnesses :

"GEORGE LEO WOLF,

"LEWIS LEO WOLF.

"I consent to the above, and ratify the same. New-York, the sixth of March, eighteen hundred and forty-one.

"JOSEPH LEO WOLF.

"Witnesses :

"GEORGE LEO WOLF,

"LEWIS LEO WOLF."

A few days after the execution of this writing, Mrs. Leo Wolf, the assured, her husband, Joseph Leo Wolf, and their only child, sailed for Europe in the steamship President, and have never since been heard of; and there is no doubt that such ship was lost at sea, and all on board perished.

In April, 1842, Geo. F. Allen, as proctor for the appellant, who was the trustee, or executor, named in the instrument propounded as a will, presented a petition to David B. Ogden, Esq., surrogate of the city and county of New-York, stating that the decedent left assets or personal estate in the city and county of New-York; and praying that the instrument propounded might be admitted to probate, and that letters testamentary thereon might be granted. The next of kin of the decedent were duly cited to attend before the surrogate, and the public administrator, having taken out administration on the estate of Joseph Leo Wolf, was also cited; and they resisted the probate of the instrument propounded, upon the ground that a married woman could not, under the provisions of the revised statutes, make a will of personal estate, even with the consent of her husband.

The surrogate sustained the objection, and rejected the instrument propounded as a will upon that ground alone. And the circuit judge of the first circuit, Hon. WM. KENT, upon appeal to him, arrived at the same conclusion.



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The CHANCELLOR, on appeal to him, examined the whole case, (1 *Barb. Ch. R.* 264,) and rested his decision on these grounds: that, since the revised statutes, a married woman has no power to make a will of personal property; and also Mrs. Leo Wolf, not having survived her husband, (no legal presumption that she did,) never had any interest in the insurance money.

Moehring brought appeal to this court.

Nelson Chase, Attorney, and

George Wood & Daniel Lord, Counsel for appellant.

 *D. Lord.*—Surrogate refused to take cognizance or enter upon proof, on the ground that married women could not make a will.—On appeal, circuit judge affirmed.—On appeal, chancellor went over whole ground and decided against us. (*Laws of 1840, p. 59.*) 

First. The policy of insurance in question is for the separate use of the wife absolutely, and none but the wife can claim the benefit of it. Being for her separate use, she is to be deemed and considered a *feme sole* in regard to the policy; and the fruits of it may be disposed of by her will; and on her dying intestate, will go to her next of kin, to the exclusion of her husband. (2 *Vesey*, 452.)

Second. And it would belong to her without the intervention of trustees. (1 *P. Wms.* 316; 3 *Atkins*, 399; *Comyn's Digest*, title *Baron & Feme*, D. 1; *Adamson v. Adamson*, 19 *Vesey*, 418–19; *Crocker v. Whiting*, 10 *Mass.* 306; 7 *Paige Rep.* 1.)

Third. The presumption from the face of such a policy is, that the premium was paid out of funds devoted to the separate use of the wife.

Fourth. If it be so considered a policy made under the act of 1840, and that the husband, under and in pursuance of that act, advanced the premium, the policy enured to the exclusive separate use of the wife, and not to the benefit of the husband, or any one claiming under him, such as creditors or next of kin.

1. Because the husband and those claiming under him can not claim, inasmuch as no provision in the act or in the policy is made for his or their benefit.

Fifth. The policy enures absolutely to the benefit of the wife, and not qualifiedly.


1. Because there is no qualification either in the policy or the statute.

2. The insertion of the first clause of the first section of the act shows it was designed to enure exclusively to her benefit.

3. The last clause of the first section does not operate as a condition restricting the broad general terms of the first clause, but merely points out by way of explanation the course in which the policy will run in a given case.

4. The second section of said act does not restrict the first and leading clause of the first section, but provides for the husband to advance under this act a premium for a policy to enure to the wife for life, and after her death to her children.

5. The last clause of the first section, and the second section of the act are directory and not conditional or restrictive.

 Married woman may make disposition of her own estate—testamentary act—her right to make it is incident to the property.—R. S. not intended to reach such a case of sole property of wife.

Such a paper is not proved as a will—we never called this a will, but a testamentary disposition of her property—of which probate courts have always taken cognizance.

Consent of husband will not authorize wife to make a will.—Act of 1840 nothing to do with the case. (2 *Sudgen on Powers*, 22, § 21; 2 *Roper, Husband and Wife*, 88, note m.)

Surrogate should take cognizance. (1 *Burr*, 461; *Doug.* 707; 6 *Maddock*, 331; 3 *Atk.* 156; 9 *Ves.* 369; 2 *Br. Ch. Cas.* 391, note B; 3 *Ves.* 246; 2 *Atk.* 49.)

Though proved in ecclesiastical court, does not determine the right to the property. (1 *Phil. Eccl. R.* 352; *id.* 254; 1 *Wood. Lec.* 263, sec. 16; 2 *J. Ch.* 523; 2 *Wood.* 208, sec. 31; 2 *R. S.* 16, §§ 21, 24.)

R. S., when critically examined, meant to leave this matter as it was before.

If a separate estate, power of disposition is implied. (1 *Ves. Jr.* 46; 3 *Br. Ch.* 8; 9 *Ves.* 369; 1 *Vernon*, 244; 2 *do.* 329.

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Jur disponendi. 2 *Ves. Sr.* 191; 3 *J. Ch.* 523; 17 *J.* 578, fullest examination of question.)

R. S. have not touched *trusts of personal estate*.—Interest under policy was her separate equitable estate by the terms of its creation. (2 *Roper's H. & W.* 158; *Clancy. Mar. W.* §§ 262, 271; 1 *Ch. Cas.* 118; 9 *Vin. Ab.* 95; *pl.* 43; 1 *Bro. Ch. C.* 532; 1 *Sim. & Stu.* 487; 19 *Ves.* 416; 3 *P. Wms.* 337—though no trust nor power nor deed—enough that husband consented.)

Separate estate of wife—the legal interest is in the husband, but the equitable interest is in the wife.

Without the act of 1840, these arrangements might be impeached by the creditors of the husband—the object of the act was to get over that difficulty.

Inasmuch as both died at the same time, chancellor says the case is not provided for by the statute. But the policy provides for the case—first part of the policy. Policy is more general than the law. 🏠

Wm. G. Sterling, Attorney, and
D. Dudley Field, Counsel for respondent.

🏠 All the persons intended to be benefited by the policy died at the same time.—This controversy is between creditors of husband and relatives of wife. 🏠

First. The application to the surrogate for the probate was not made by one who had a right to claim it. (2 *R. S.* 60, §§ 24, 25; *Laws of 1837*, 524, §§ 4, 10, 11, 17, *p.* 68, § 67.)

Second. There was no proof of the due execution of the instrument propounded as a will. (2 *R. S.* 61, § 26; 3 *Bl. Com.* 498, *History of these instruments*; *Lovelace Wills*, 267; *Jarmin Wills*, 24; 15 *Ves.* 156.)

Third. Whether since the revised statutes a married woman can execute a power of appointment, in the nature of a will, over personal property, held by her as a separate estate, when such power is contained in the instrument creating the estate, is a question which does not arise in the present case. Here there is no such power; on the contrary, the policy, by making the insurance payable to the children in the event of Mrs.

Leo Wolf's not surviving her husband, precludes such an idea. But were there such a power, and were its execution valid in equity, as a testamentary disposition, there is nothing to authorize the instrument being admitted to probate by the surrogate, as a will of personal property, whatever may be the practice of the ecclesiastical courts in England. (2 R. S. 56, § 1; 60, § 20.)

Fourth. The surrogate's court, as it now exists, is not, as were the court of chancery and the supreme court, a court of general jurisdiction, but a mere creature of the statute; and whatever jurisdiction is claimed for it must be affirmatively shown. Its powers are by no means co-extensive with, or to be deduced from, those of the ecclesiastical courts in England. To authorize a surrogate to admit a paper to probate, it is therefore necessary that the instrument should be such as he is empowered to receive, and that it should have been executed by a person coming within the provisions of the law giving jurisdiction to the officer. (2 R. S. 173, § 1; 196, § 1; 220, § 1; *Glynn v. Oglander*, 2 Hagg. 432; 1 R. L. 444; *Rev. Notes*, 3 R. S. 679; *Dakin v. Hudson*, 6 Cow. 221; *Bloom v. Burdick*, 1 Hill, 130.) No power has been given to the surrogate to receive and admit to probate an instrument purporting to be the will of a married woman. (2 R. S. 56, § 1; 60, § 21, 23, 26, p. 61, § 29, 30; 3 *Tomlin's L. D.* 802.)



Fifth. The provisions of the revised statutes, respecting "Powers" and "Uses and Trusts," have reference exclusively to real estate, except as regards limitations of future or contingent interests in personal property, and in no way relate to the execution of "Powers" by married women in respect to personal property. (*Kane v. Gott*, 24 Wend. 661.)

§ 1 R. S. 735, §§ 110, 115, power by grant or devise as to real estate, but not as to personal. ❧

Sixth. The power to make a will being regulated by the statute, and a married woman being expressly excluded from its provisions, any will made by her must necessarily be void. Even before the revised statutes, a married woman could not make a will, though she might have executed a testamentary



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paper in the nature of a will. But whether even that, with the then undefined powers of the surrogate's court, would have been admitted to probate, in analogy to the course adopted by the ecclesiastical courts in England, is at least doubtful. (2 *Bl. Com.* 12; 2 *Roper, Hus. and Wife*, 188; *Stone v. Forsyth*, *Doug.* 707, *n.*; 3 *Atk.* 166, *n.*; *Tappenden v. Walsh*, 1 *Phill.* 353; *Stevens v. Baywell*, 15 *Ves.* 156; 2 *R. S.* 60, § 21; 1 *R. L.* 367, § 16; 3 *Johns. Ch.* 523.)

 Words "no other" put in by legislature, not in report. 2 *Jarmin Wills, Appendix G.* 58, § 8; *Act 1, Vict. Ch.* 26, copied from our statute that gave right to make will as before. 

Seventh. Not only are married women excepted out of the statute of wills, whether they act with or without their husbands' consent, but the revised statutes, which require the husband to take out letters of administration on the property of the wife, and to give bonds as other persons for the payment of the debts of the wife, as well as the other provisions respecting her assets unadministered at the husband's death, have created rights in parties other than the husband, which would be affected by her will of personal property. (2 *R. S.* 75, §§ 29, 30; *Rev. Notes*, 3 *R. S.* 626; 2 *Story Eq.* §§ 1389, 1391.)


Eighth. Mr. Leo Wolf, the object of the insurance, having perished in the steamer *President*, as well as his wife and only child, the legal presumption is, either that he survived them, or that they all perished together. There was never, therefore, any room for the operation of the act of 1840, nor did the insurance money ever become payable to Mrs. Leo Wolf or her child, according to the terms of that act. (*Leboyne's case*, 3 *Hagg.* 748; *Taylor v. Diplock*, 2 *Phill.* 261; *Calvin v. Procurator General*, 1 *Hagg.* 92; 1 *Greenl. Ev.* 3d ed., §§ 29, 30; 4 *Burge's Com.* 11-29.)

 Interest vested in husband or his representatives—perished by a common calamity. (*Best on Presumptions*, § 141; 31 *L. L.*; *Lovelace Wills*, 266.) 

Ninth. Neither of the contingencies contemplated by the act of 1840 having occurred, the insurance money is payable to

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the personal representatives of the husband, in the same manner as if that act had not been passed.

 *G. Wood*, for appellant, in reply.—Whether considered a will in equity—commonly called appointment in nature of a will—or under statute of 1840, it is same thing to us.

Policy reserves no interest in husband—presumption is the premium paid from the separate property of wife.—7 *Paige*, 1, 112, chancellor has held this doctrine himself.—Act of 1840 repeals nothing.

Object of act was to enable husband to provide for his wife to the exclusion of his creditors.—Good right at common law. Good under act of 1840. (19 *Vesey*, 418–19.)

Not a married woman in equity with reference to her separate estate—R. S. not apply to this case.—As to equitable property, she is a *feme sole*. (*Chickling on Equitable Estates*, 161.)

Should construe statute of wills as applying only to *legal* estates. 

DECISION.—*Decree affirmed—unanimously.*

NOTE.—On the ground “that the surrogate had no jurisdiction under the statute to take proof of the will of a married woman.”

Whether a court of equity could give any effect to the paper was not decided. (No written opinions.)

Not reported.

BOUCHAUD, executor, &c., appellant, *agt.* DIAS & FURMAN,
respondents.

Questions discussed.

1. Whether a bill filed by *two creditors*, sureties on custom-house bonds, claiming, for that reason, priority above all other creditors, against a defendant, *assignee in trust* of an insolvent firm—the assignment being made to indemnify the assignee, as surety for the firm also on custom-house bonds, was defective for *want of parties*?

2. Whether, under the act of congress, (1799, *ch.* 128, § 65,) the *United States* are *preferred creditors*, where the insolvent debtor has only assigned his

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property for the purpose of paying or indemnifying a *single creditor* or surety, and not for the benefit of creditors generally?

That is, was it necessary that the bill should have been filed in behalf of *all the creditors* of the insolvent firm, where its object was to establish the right of priority in the United States, with regard to custom-house bonds, paid by the complainants, and their subrogation in the place of the United States, by reason of such payment; and that the *assignee*, by reason of misapplication of the trust funds, be charged *personally*?

3. Whether, if the complainants were entitled to subrogation in the place of the United States, they were equally, with the latter, protected against the operation of the *statute of limitations*?

It appeared by the bill filed in this case, by Joseph L. Dias and Job Furman, complainants, that Henry Castro and Louis B. Henriques were formerly merchants in the city of New-York. They became insolvent, and in May, 1823, Castro, in his own name and that of Henriques, by power of attorney from him, (who was then in France,) executed to Louis A. Brunel, of the city of New-York, an assignment of a large amount of property, then in the possession and under the control of Castro and Henriques, consisting of goods, wares and merchandize, and certain leasehold estates in the city of New-York. Also certain household furniture of Castro, upon trust, after paying expenses, to pay and satisfy certain moneys paid and liabilities incurred by said Louis A. Brunel, or by the house of F. & A. Brunel, of which the said Louis A. was a member, by indorsement or otherwise, and on account of the said Castro and Henriques, and also to pay certain bonds, given by said Castro to the United States for duties and merchandize imported by Castro and Henriques, and which bonds the said Louis A. Brunel had executed as surety for said Castro.

The bill charged, on information and belief, that the assignment, although it did not purport on its face to be an assignment of all the estate of the said Castro and Henriques, yet that it was so in fact; and that it embraced and covered all their estate, real and personal, amounting to about \$80,000, which amount came into the hands of said Louis A. Brunel.

That the whole indebtedness intended to be secured by the assignment was the amount of custom-house bonds, on which said Louis A. Brunel was surety, amounting to \$30,636.26, and

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the debts paid or liabilities incurred by the said Louis A. Brunel, or F. & A. Brunel, amounting to \$6,873.83.

That Castro and Henriques were, at the time of executing the assignment, largely indebted to the United States upon other bonds given for duties, besides those above mentioned; some of which, one of the complainants, Job Furman, had executed as surety with said Castro, and others were executed by said Castro and one Garniere Thiolliere. That judgments were recovered upon all the said bonds in favor of the United States, against said Castro, and the several parties who had executed the same with him as sureties; and charged, that by reason thereof, and in pursuance of the statute, the United States were entitled to a priority of payment over all the other creditors of said Henry Castro.

That Brunel pretended that the assigned property was insufficient to pay the debts secured by the assignment. Whereas, it was charged, on information, that without wilful default and neglect of the assignee, the property so assigned was abundant, not only to pay all the debts provided in the assignment, but also to pay all the custom-house bonds of said Castro, and also a large dividend on other debts.

Also charged that Brunel, the assignee, in disregard of the duties he owed to the sureties of said Castro, upon the United States bonds aforesaid, had paid the simple contract debts mentioned in the assignment, amounting to the sum of \$6,873.83 as aforesaid, and thereby made himself personally answerable, and his estate in the hands of his executors liable, for so much money as was thus misapplied.

That Louis A. Brunel died on or about the 29th July, 1833, having a large amount of the property of Castro and Henriques assigned to him as aforesaid, in his hands, and leaving a large amount of the said bonds, as well as those in which he was surety to the United States for said Castro, as others, in which he had not joined as surety, entirely unpaid and unsatisfied. That said Brunel, previous to his death, duly made and published his last will and testament, and thereby appointed Joseph Bouchaud executor, who qualified as such, and letters testa-

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mentary were granted to him by the surrogate of the city of New-York, on the 14th March, 1834. That Bouchaud took possession of the said assigned property, which was in the hands of Brunel at the time of his death.

That Bouchaud thereafter pretended that Brunel had died insolvent, yet he nevertheless paid to sundry simple contract creditors of Brunel their respective demands, without regard to the priority of the United States, under and by virtue of the bonds executed by Brunel, in their favor, and with full knowledge of the same, and also without making any distinction between the said assigned funds and property and those held by Brunel in his own right, but charged that the whole funds and property received by Bouchaud as executor had been mingled together.

And also charged that Bouchaud was personally liable to the extent of the assets received by him from the estate of Brunel.

Also charged, that the following bonds, executed by the said Henry Castro, were still due and unpaid; fourteen bonds executed by Castro as principal and Garniere Thiolliere as surety for various sums, amounting in the whole to \$6,886.92. One bond executed by Castro as principal, and Louis A. Brunel as surety, for \$1,027. Three bonds executed by Garniere Thiolliere as principal, and the said Henry Castro as surety, in various sums amounting in the whole to \$1,910.05, the aggregate amount of said bonds being \$9,823.97.

That judgments were recovered on all said bonds in the district court of the United States for the southern district of New-York, in favor of the United States against the obligors in said bonds respectively.

That the complainant, Job Furman, signed as surety for said Henry Castro three bonds for duties to the United States, March 19, 1823, for \$1,153.84 each, upon which judgments had been obtained by the United States against said Furman and Castro, and which had been paid by Furman on the 15th December, 1824, the principal interest and costs amounting to \$3,787.52, and charged this sum to be a lien on the estate of

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Louis A. Brunel, and entitled to priority of payment, the same as if said judgments and bonds were held by the United States.

That the other complainant, Joseph L. Dias, was surety with said Louis A. Brunel on two bonds executed by said Henry Castro as principal, in favor of the United States, for \$2,968 each, upon which judgment had been obtained against said Dias, Brunel and Castro, in favor of the United States, March 1, 1824. On the 7th November, 1834, the complainant Dias paid upon said last mentioned judgment \$1,000, which he charged to be entitled to priority of payment out of the estate of Castro and Henriques or Louis A. Brunel, in the same manner and to the same extent as if held by the United States.

The bill stated that Castro, in March, 1824, obtained a discharge under "an act to abolish imprisonment for debt in certain cases," passed April 7, 1819, by which he was directed and did assign to the complainant Dias all his estate, real and personal, for the benefit of his creditors. That in June, 1824, Henriques obtained a like discharge, and assigned all his estate, real and personal, to one Fulgence Chegaray, for the benefit of his creditors. And the bill claimed, that by virtue of these assignments all the estate of Castro and Henriques, respectively, became and was vested in the respective assignees, Dias and Chegaray.

The complainants admitted that the United States were entitled in common, with their claim as sureties of the said Henry Castro, as before stated, to a priority of payment out of the estate of said Louis A. Brunel of the bond executed by him as surety with said Castro for \$1,027, as before stated, with interest and costs, and also a priority of payment over the other creditors out of the estate of Castro in the hands of Brunel, at the time of his decease, of the other bonds executed by Castro, either as principal or surety, as before stated; and that if there were not sufficient assets in the hands of Brunel at the time of his decease, of the estate of said Castro and Henriques, then that the estate of Brunel, which came to the possession and control of said Bouchaud, his executor, was answerable for the

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same, by reason of the misapplication by Brunel of the funds received from said assignment; and that any sums of money due from said Brunel on account of the estate of Castro, being received and held by him in trust for the United States and other creditors, who were or might be subrogated in the place of the United States, and have the same rights with them, were entitled to a priority of payment over other debts of Brunel, in case of deficiency to pay the whole.

The complainants charged that they were respectively entitled, in common with the United States, and on the same principle with them; to a priority of payment upon the bonds paid by them, or for so much thereof as was paid by them; and that in case of a deficiency of assets of the estate of Brunel to pay the full amount of said debts, before stated, as entitled to priority, that they were entitled to a rateable share or distribution with the United States of the funds or estate of Brunel, or of such part as did come, or might have come, to the hands of Bouchaud, his executor.

The bill charged a knowledge of Castro's indebtedness to the United States to Brunel when he took possession of the assigned property; also a like knowledge of Brunel's indebtedness to the United States and to Job Furman, to Bouchaud his executor, before letters testamentary were issued; also a knowledge that Brunel then had a large amount of property of Castro and Henriques in his hands; and that a large amount of custom-house bonds of said Castro remained unpaid.

That the complainants might be decreed to be paid the full amount due to them as above mentioned, with interest, on the principles before stated, from the estate of Brunel, if sufficient; if not, then out of the proper goods and effects of Bouchaud, the executor.

The United States, Joseph Bouchaud, Fulgence Chegaray, Henry Castro and Louis B. Henriques, were made defendants.

Joseph Bouchaud, one of the defendants, demurred, generally, for want of equity.

The vice-chancellor of the first circuit overruled the demurrer. His decision was appealed to the chancellor, who,

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on the 28th October, 1845, affirmed the decision of the vice-chancellor, with costs. No opinion was given by the chancellor.

The defendant, Bouchaud, brought an appeal from the decree of the chancellor to this court.

*Sandfords & Porter, Attorneys, and
Edward Sandford, Counsel, for appellant.*

First. The bill is not exhibited by or in behalf of all the creditors of Castro and Henriques, nor of all the creditors of Louis A. Brunel. It sufficiently appears, upon the face of the bill, that there are other creditors, and the bill shows a want of proper parties.

1. It is a bill by simple contract creditors involving an account, not only of Castro and Henriques' estate, but also of the estate of Brunel, and all the creditors should have been made parties. (*Story's Eq. Pl.* §§ 99, 216, 105; *Willis's Pleading*, 220; *Mitford's Pleading*, 166, 167; *Fish v. Howland*, 1 *Paige*, 20; *Hallett v. Hallett*, 2 *Paige*, 19; *Wakeman v. Grover*, 4 *Paige*, 23, 33; *James v. Lansing*, 7 *Paige*, 583; *Calvert on Parties*, 28, 31; *Egberts v. Wood*, 3 *Paige*, 517; *Baldwin v. Laurence*, 2 *Sim. & Stuart*, 18, 26; *Brown v. Ricketts*, 3 *J. C. R.* 553.)

☞ Casneau, Thuvilliere and F. Brunel should be made parties. ☞

2. It is not necessary to name the persons who should have been made parties. That might be impossible. The rule, that a party demurring for want of necessary parties, must show who are the proper parties, from the facts stated in the bill, is complied with, when the objection to the bill is so pointed out as to amend it by making proper parties. (*Story's Equity Pl.*, §§ 543, 238; *Tourton v. Flower*, 3 *P. W.* 369, 371; *Pyle v. Pyle*, 6 *Ves.* 780, 781; *Atty. Gen. v. Jackson*, 11 *Ves.* 365, 69, 70; *Atty. Gen. v. the Corporation of Poole*, 4 *Mylne & Cr.* 17, 32; 1 *Dan. Ch. Pr.* 335, 336.)

3. Upon a demurrer to a bill for want of equity, the objection that the bill is defective for the want of parties may be taken. (*Vernon v. Vernon*, *Story's Eq. Pl.* § 543, note 3.)

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It may be assigned *ore tenus*, as a ground of demurrer, or the objection may be taken at the hearing. (*Willis's Pleading*, 462, note b; *Pyle v. Pyle*, 6 Ves. 780; *Darwent v. Walton*, 2 Atk. 510; *Story's Eq. Pl.* § 464; *Brinckerhoff v. Brown*, 6 J. C. R. 137, 139; *Newton v. Earl of Egmont*, 4 Simons R. 574.)

☞ Only lose costs by omitting to make question in the demurrer. ☞

Second. It appears from the bill that the plaintiffs seek to reach property or its proceeds, conveyed by Castro and Henriques to Louis A. Brunel, upon certain trusts expressed in the conveyance, one of which was to pay certain liabilities incurred by the house of F. & A. Brunel, of which Louis A. Brunel was a member, amounting to \$6,873.83. (*Bill, folios 6 and 9, case, pages 15 and 17.*)

The surviving partner of that house should have been made a party, or a sufficient excuse for the omission should have been set forth in the bill.—There is an allegation that this debt was paid, (fol. 41,) and the firm is liable to contribute.

Third. The bill shows that the property conveyed to Louis A. Brunel by the deed, in trust, consisted, in part, of real estate. The trustee died, without making any devise or testamentary disposition of his real estate. The bill does not show that Brunel, in his lifetime, ever disposed of the real estate so conveyed to him by Castro and Henriques, and yet seeks to charge the defendant personally with the payment of the debts of Castro and Henriques, because he has paid some of the debts of Brunel. The heirs at law of Louis A. Brunel should have been made parties to the bill.

Fourth. The bill shows that there are creditors of Louis A. Brunel who have received the moneys to which the plaintiffs claim title, and that the estate of Brunel is insolvent. The creditors who have received the moneys so paid, and the creditors who have a right to controvert the claims set up by the plaintiffs should have been made parties. Those who have received payment may be liable to contribute. The appellant is, in no sense, a trustee for them. (*Story's Eq. Pl.* § 103, a;

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Peacock v. Mark, 1 *Ves. Sr.* 127, 131; *Van Cleef v. Sickles*, 5 *Paige*, 505; *David v. Frowd*, 1 *Mylne & Keen*, 200.)

Fifth. Upon the death of Louis A. Brunel, in 1833, the trust estate conveyed to him by Castro and Henriques did not pass to the appellant as his personal representative, but the trust, so far as it was then unexecuted, vested in the court of chancery. The appellant, executor, is not accountable to the plaintiffs therefor; but a proper person should have been appointed to execute the trust. (1 *Rev. Stat.* 730, § 68; *David v. Frowd*, 1 *My. & K.* 200.)

☞ Thus far parties—want of. ☞

Sixth. If the bill be regarded as sufficient in respect to parties upon the case stated therein, the plaintiffs did not acquire any *liens* upon the assigned fund. (*United States v. Fisher*, 2 *Cranch*, 358, 390; *Beaston v. The Farmers' Bk. of Delaware*, 12 *Peters*, 102, 128, 133.)

☞ No lien on property—debtor might sell. ☞

Seventh. The case stated by the bill does not show that the United States ever acquired any right of *priority* against the property of Castro and Henriques. Brunel obtained the legal title, and his equity was equal to other sureties. (*U. S. v. Hove*, 3 *Cranch*, 73, 91; *Prince v. Bartlett*, 8 *Cranch*, 431; *Conard v. The Atlantic Ins. Co.* 1 *Peters R.* 439; *Conard v. Nicholl*, 4 *Peters*, 308; *Boent v. Bank of Washington*, 10 *id.* 596; *Beaston v. Farmers' Bk. of Delaware*, 12 *id.* 133, 135; *U. S. v. Shelton*, 1 *Brock. C. C. R.* 517; *U. S. v. McLellan*, 3 *Sumner's R.* 345, 352-54; *Thelluson v. Smith*, 2 *Wheat.* 396, 424; *U. S. Stat. at large*, 515; *Act*, 1797; *p.* 263, *yr.* 1792; *p.* 42, *yr.* 1789, § 21; *p.* 169, *yr.* 1796, § 45; *p.* 263, § 18.)

Eighth. As against the appellant, and the estate of Brunel, the bill does not show any right to charge the appellant with the alleged devastavit, because it is not averred that the appellant had notice of the debts due to the United States, after he became executor. (*Bill*, *fol.* 41, 42; *U. S. v. Fisher*, 2 *Cranch*, 490, *note*; 12 *Peters*, 129-30, *note above cited*; *Aiken v. Dunlap*, 16 *J. R.* 77, 85.)

Ninth. The claim of the plaintiff, Job Furman, set forth in

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the bill of complaint, is barred by lapse of time and the statutes of limitation. His demand does not grow out of any trust, but is in hostility to it. It was a legal demand. The bill shows that the property transferred by Castro and Henriques to Brunel was of the value of \$80,000; and the claims stated against it do not amount to \$50,000. Furman's right of action accrued December 15, 1824, and act of congress gave him an action at law, or in equity, in his own name to recover the moneys paid upon his bonds. (*Act of 1792, ch. 27*; 1 *Stat. at large*, 263; *Thelluson v. Smith*, 2 *Wheat.* 396, 424; *Act of 1799, ch. 22*, § 65; 1 *Stat. at large*, 676.)

If his right of action against Brunel as assignee did not accrue until Brunel paid other claims out of the assigned property, the bill shows that Brunel did pay such claims in his lifetime, (*fol.* 16.) Had the United States sued in the state court, they would be bound by the limitations to actions prescribed by state laws to suitors in their own courts; and congress has no constitutional power to bind state legislation on the subject of the limitation of actions. But if the United States be not subject to the statutes limiting actions, passed by the states, the plaintiffs are not exempt therefrom.

1. Because the act of congress does not give this right to sue, at any period of time, to the sureties.

2. Because where the United States have been exempted from the operation of statutes limiting actions, it has been on the ground of political prerogative, applicable only to public governments. (*United States v. Hoar*, 2 *Mason*, 311, 314; *People v. Gilbert*, 18 *J. R.* 227; *Bank of S. C. v. Gibbs*, 3 *McCord*, S. C. R. 377; *Bank of U. S. v. Planters' Bank*, 9 *Wheat.* 307.)

But if the claim of the plaintiffs be regarded as *equitable*, there was a concurrent remedy at law, and the period limited for an action at law was binding on the court of chancery. (*Murray v. Coster*, 20 *J. R.* 576, 585; *Kane v. Bloodgood*, 7 *J. C. R.* 90, 125, 128; 2 *Story's Eq. Jur.* §§ 1520, 1521, *a*, and notes; *Humbert v. Trinity Church*, 7 *Paige*, 195; 2 *Rev. Stat.* 301, § 49; 3 *Rev. Stat.* 705, § 51; *Revisers' Notes*; *Fonb. Eq.* 329,



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book I, ch. 4, § 27, and notes; *Jeremy's Eq. Jur.* 548; *Hoven-den v. Ld. Annsley*, 2 Sch. & Le F. 607, 630; *Rayner v. Pearsall*, 3 J. C. R. 578; *Ray v. Bogert*, 2 John. Cas. 432; *Moers v. White*, 6 J. C. R. 360, 369; *Kingsland v. Roberts, exr.* 2 Paige, 193.)

Tenth. Job Furman was improperly joined as a plaintiff, and this objection may be taken on general demurrer. (*Story's Eq. Pl.* 416, note 3.)



Eleventh. The bill of complaint does not show any equity against the appellant. There is no pretence that he has any assets unadministered.

Twelfth. The decree appealed from should be reversed. The demurrer should be allowed, and the bill of complaint dismissed with costs. (1 *Paine*, 627.)

 *Reply.*—U. S. have never appeared in the suit, and have nothing to do with the controversy. Our appeal is against Dias and Furman, and U. S. have nothing to say. (8 *Peters*, 362; 1 *Baldwin*, 418, 419; 1 *Woodbury & Minot*, 80, 82; 5 *Clark & Finn.* 1, 15, 16; *Story on Confl. Laws*, §§ 576–580; 1 *Brock.* 203; 16 *Peters*, 631–5.) 

*Francis F. Marbury, Attorney, and
John L. Mason, Counsel, for respondents.*

*Benjamin F. Butler, District Attorney, United States, for
Southern District of New-York, for the defendants, United
States.*

 10 *Paige*, 445, (opinion,) bill before it was amended. 

First. The amended bill of complaint in this cause is not defective for want of parties.

1. It is not a bill filed in behalf of all the creditors of Castro and Henriques.

2. Nor is it filed for an account of the manner in which the trusts of the assignment of Castro and Henriques have been executed.

3. But it is filed in behalf of a particular class of creditors, who are entitled to a priority above all others, viz., sureties of Castro on bonds to the United States. (1 *U. S. Statutes at large*,

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p. 515, *Act of 3d March, 1797, sec. 5*; *id.* *p.* 676, *Act of March 2, 1799, sec. 65*; *Hunter v. United States*, 5 *Peters*, 172.)

4. Those persons who stand in the same situation as to their rights or claims on the fund are alone necessary parties complainant. (*Hallet v. Hallet*, 2 *Paige*, 19; *Egberts v. Woods*, 3 *Paige*, 517–20; *Burney v. Morgan*, 1 *Sim. & Stu.* 358.)

☞ *Sandford's Second, Third and Fourth points* not made before the chancellor. 1 *Barb. Ch. Pr.* 396. ☞

Second. The allegations of the bill are sufficient to establish the right of priority in the United States with regard to the custom-house bonds paid by the complainants, and their subrogation in the place of the United States by reason of such payment. (1 *U. S. Statutes at large*, pp. 515, 676.)

Third. The bill also shows a case entitling the complainants to the discovery and relief sought thereby against the defendant.

Fourth. The statutes of limitation of this state have no application to demands like those of the complainants, because,

1. Claims of the United States are not affected by such statutes. (*United States v. Buford*, 3 *Peters*, 12; *United States v. White*, 2 *Hill*, 59; *People v. Gilbert*, 18 *Johns.* 227.)

2. The complainants, as sureties on custom-house bonds, are subrogated to all the rights and remedies which the United States possessed, and are equally with them protected against the operation of statutes of limitation. (1 *U. S. Statutes at large*, *p.* 676; *Pitman's Law of Principal and Surety*, 24 *Law Lib. U. S.* *p.* 132, and cases there cited.)

On the supposition that the statute of limitations does apply to such cases as the present—then we say,

Fifth. The claims of the plaintiffs are equitable demands and cognizable only in a court of equity, and therefore the only limitation that can apply to them is the limitation of *ten years* to bills for relief in cases of trusts not cognizable at common law. (2 *R. S.* *p.* 302, 1st ed., *sec.* 52; *Dias v. Brunel's exrs.* 24 *Wend.* 9; 1 *Paine*, 629.)

Sixth. But this statute being an entirely new statute, was prospective merely, and does not affect demands already in existence. (*Johnson v. Burrell*, 2 *Hill*, 238; 2 *R. S.* *p.* 248,

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1st ed. § 129; *Millard v. Whitalcer*, 5 *Hill*, 408; *Fairbanks v. Wood*, 17 *Wend.* 329; 3 *R. S.* 704, *Revisers' notes*; *Dash v. Van Kleeck*, 7 *Johns.* 493.)

Seventh. At all events, the statutory bar can only commence with the enactment of the new statute, that is, on the first January, 1830. (*Sayre v. Wisner*, 8 *Wend.* 661, and cases there cited; *People v. Supervisors of Columbia*, 10 *Wend.* 363; *Cases cited under the last point.*)

Eighth. Louis A. Brunel, the testator of the defendant, having died on the 29th of July, 1833, the operation of the statute was suspended for eighteen months, that is, until the 29th of January, 1835, and the ten years' limitation, supposing it to affect the case, did not expire until July, 1841, whereas the original bill was filed January 23, 1841. (*Wenman v. Mohawk Ins. Co.*, 13 *Wend.* 267; *Howell v. Babcock's exrs.*, 24 *Wend.* 488; *Reynolds v. Collins*, 3 *Hill*, 36.)

Ninth. The decree of the chancellor should be affirmed with costs.

☞ Brunel was a surety in some form for all the debts which the assignment required him to pay. ☞

☞ *B. F. Butler*, district attorney, southern district, New-York, appears for the U. S.—I admit that on demurrer for want of equity may object *ore tenus* that there is a want of parties. But should not be allowed to make question here not made before the chancellor. (1 *Barb. Prac.* 396; 18 *J. R.* 558; 1 *Bland's Rep.* 14; 2 *Sch. & Lef.* 689, 712; 9 *J. R.* 591, 612; 2 *H.* 161.)

I admit it may be fairly inferred that bonds of Casneau and Thuvilliere have been paid—but there is nothing to show that they made the payment, and so they are not necessary parties.

No presumption that they paid, but the contrary.

Don't appear Brunel had any partner; he used the name of a firm—common case, though partner dead.

Is the case within the statute? ☞

DECISION.—Decree reversed and bill dismissed, with costs in the court of chancery.

For reversal: BRONSON, GRAY, RUGGLES, WRIGHT, JOHNSON and GARDINER. For affirmance: JEWETT. JONES gave no opinion.

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NOTE.—The court *held*, BRONSON, J., delivering the opinion, that the provision of the act of congress, (1799, *ch.* 128, § 65,) so far as it touched this question, only gives a priority to the United States in cases of insolvency, where a “debtor, not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof, for the benefit of his or her creditors.” And that this provision never had been and never should be carried beyond cases where the debtor had made an assignment for the benefit of his *creditors in general*. Here the assignment was made for the benefit of Brunel alone. The bill could not be maintained

Reported 1 Comstock, 201.

BELL, appellant, *agt.* STAINER, respondent.

Questions discussed.

1. Whether the *bond and mortgage* given by the respondent, and which by his bill he sought to have cancelled, were procured by *fraud*?

2. Whether the respondent failed to make out the case of fraud alleged in his bill?

3. Where the fraud alleged in the bill was, that James H. Bell, at the time he agreed to sell the lots to the agent of the respondent, pretended to be the owner thereof; that he never had any legal or equitable title whatever to said premises, but so pretended to be the owner thereof to defraud the respondent; that he only had a contract of sale thereof from the owner, which contract was only in the nature of a conditional sale; and that he concealed the existence of said conditional sale to defraud the respondent,

Whether the evidence was sufficient to overcome the answer of James H. Bell, which being responsive to the bill, denied the allegations of fraud?

4. Whether respondent (the complainant) by any act of his subsequent to the giving of the bond and mortgage waived or barred his defence to the enforcement thereof in the hands of Isaac Bell, the assignee?

Edward Stainer, of the city of New-York, the complainant, on the 17th of February, 1840, filed his (amended) bill in the court of chancery, against Isaac Bell and James H. Bell; in which he stated, that on or about the month of June, 1836, he agreed to purchase of one James H. Bell certain real estate in the state of Ohio, who, at the time of such agreement, pretended to be the owner thereof, and afterward the said James H. Bell executed and delivered to said Stainer, for a considera-

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tion therein stated, a deed of said real estate. The bill then sets out a warranty deed, dated August 1, 1836, from James H. Bell to Edward Stainer, for the consideration of six thousand dollars, conveying three lots of land in Sandusky city, Ohio. That after the execution and delivery of said deed, Stainer executed a bond and mortgage, conditioned for the payment of \$4,000, as part of the consideration money, the mortgage describing the same premises.

The complainant then states, that after the execution and delivery of the bond and mortgage, he caused inquiry to be made into the title of the premises, and was informed and believed that said James H. Bell never had any legal or equitable title whatsoever to said premises, except as hereinafter mentioned, but that he so pretended to be the owner thereof with the view and intent to defraud the complainant. Complainant was informed and believed that at the time of the agreement so made as aforesaid, the said James H. Bell had a contract of sale of said real estate from the owner thereof, which contract, however, was only in the nature of a conditional sale; and complainant alleged that he would not have made an agreement for the purchase of said real estate in the manner aforesaid, if he had been informed of such conditional sale. Complainant charged the fact to be, that the said James H. Bell concealed the existence of said conditional sale, with the view and intent to defraud the complainant. Complainant was informed and believed, that by the terms and conditions of said sale to Bell, the same had become forfeited, so that a conveyance of said real estate from the owner thereof could not then, in law or equity, be enforced. Complainant stated that he never had possession, nor said Bell never had possession of said premises; and believed that possession thereof remained in one or more persons who claimed the legal title thereto, and who refused to permit complainant to take possession. Complainant stated that the person or persons so holding or claiming to have the legal title to said premises adversely to complainant, had, as complainant was informed and believed, a good, valid and legal title thereto, as well as the possession and enjoyment thereof.

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Complainant alleged that the conditional sale to James H. Bell had become forfeited and void, by reason of the non-fulfilment by said Bell of the terms and conditions thereof; and which forfeiture was incurred before complainant had any knowledge or information of the existence of said agreement. Complainant had no information, and was unable to state more particularly how, or in what manner, said sale became forfeited; and prayed a discovery thereof from said Bell.

Complainant on or about August 1, 1837, paid to Isaac Bell the sum of \$240 for interest on said bond, but paid it without any knowledge that James H. Bell never had any legal title to the premises, or that he was possessed of said conditional sale only, or that the conditional sale had become forfeited. Complainant had paid no interest to Isaac Bell on said bond, or in any way acknowledged an indebtedness by virtue thereof since information that James H. Bell had no legal title to the premises at the time, nor since the conveyance was made to complainant. Complainant communicated such information to Isaac Bell as soon as he was able, by exercising due diligence after the same came to the knowledge of the complainant, and then caused notice to be given to Isaac Bell, that he did not deem himself liable equitably or legally to pay said bond or mortgage.

Complainant stated, that after the execution and delivery of the bond and mortgage, said James H. Bell executed an assignment or transfer thereof to Isaac Bell, of the city of New-York, the father of said James H. Bell. That Isaac Bell, after being informed of the fraudulent sale, refused to deliver up to complainant said bond and mortgage, but claimed to hold complainant responsible for the amount due thereon. Complainant stated that Isaac Bell took the transfer or assignment of the bond and mortgage subject to all the existing equities between complainant and James H. Bell.

Complainant called for an answer on oath, and for an injunction restraining the prosecution at law or in equity of the said bond and mortgage; and prayed for a decree that said bond and mortgage be delivered up to complainant to be cancelled.

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On the 27th February, 1840, Isaac Bell, the appellant, answered the amended bill, and on the 20th of August, 1841, James H. Bell put in his answer under oath as required by the amended bill. Replications were filed to these answers. Before the testimony was taken, the respondent's solicitor stipulated and agreed "that the answer of said James H. Bell should be deemed to have the same legal effect as if it were the answer of the said Isaac Bell." It is only necessary, therefore, in bringing out the whole case, to allude to the answer of James H. Bell.

The answer of James H. Bell admitted that complainant did somewhere in or about the month of June, 1836, or previous thereto, agree to purchase of defendant, though not in person, but through his agent, one Andreas Antoine Melly, who was then in the city of Sandusky, Ohio, where defendant was then residing, certain real estate situate in the state of Ohio, and that the defendant afterwards executed and delivered to the complainant such deed thereof, as in said bill of complaint mentioned, and for the consideration of \$6,000, but denied that said deed was executed and delivered on the 1st of August, 1836, but averred that said deed, though it bears date the first day of August, 1836, was not executed or delivered until somewhere in or about the month of January, 1837.

Admits that complainant did, cotemporaneously with the execution and delivery of the said deed, through one Eugene Dutilh, who was at the time of the execution and delivery of the bond and mortgage in said bill mentioned, also the attorney of the said complainant, execute and deliver to the defendant such bond and mortgage for the purposes in said bill mentioned.

After stating that defendant had no knowledge or information except from the bill of complaint, of various allegations of the complainant, the answer proceeded as follows:—

And this defendant further answering, saith that he, this defendant, at and previous and subsequent to the time of the agreement by said complainant to purchase the real estate in said bill mentioned and described, resided in the city of Sandusky, state of Ohio; that previous to the said last mentioned

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agreement by the said complainant, and while this defendant was residing at Sandusky as aforesaid, this defendant contracted with J. and J. W. Hollister for the purchase of certain lots of ground in said Sandusky, and among other lots for the purchase of those in said bill mentioned as sold by this defendant to the said complainant; that the aforesaid contract so made by this defendant with the said Hollisters was in writing, and was entered into by this defendant, in the full confidence and belief, and under full and positive assurances from them, that they, the said Hollisters, could and would be able to make a full and valid title in fee simple to the aforesaid premises. That after this defendant had made the aforesaid contract with the said Hollisters, and while the same was in full force, this defendant, in the full belief and confident expectation that the said complainant would, under the contract with this defendant, and then about to be made, obtain a good and valid title in fee simple to the premises then to be purchased by him from this defendant, and in said bill more particularly mentioned, somewhere in the month of May or June, one thousand eight hundred and thirty-six, in Sandusky aforesaid, entered into the contract for the sale thereof to the said complainant, for the sum of six thousand dollars, with or through one Andreas Antoine Melly, then also in Sandusky aforesaid, as the attorney of the said complainant, and this defendant accordingly, in pursuance and in part fulfilment of said contract, received the sum of two thousand dollars, part of the consideration money for the sale of the aforesaid premises, by a draft drawn by the said Melly on the said complainant, then in the city of New-York.

And this defendant further answering, says that some four or five months afterward, this defendant went to the city of New-York and then had a conversation with the said complainant, and told him in the month of January, one thousand eight hundred and thirty-seven, that he, this defendant, could not give him any other paper than a release or quit-claim of his right and title under the said contract with the said Hollisters as aforesaid, that he, this defendant, had not then the legal title to the aforesaid premises, but only held the aforesaid contract

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of sale, and that he would not then make a legal title. That said complainant then said that he would be satisfied with any thing that this defendant could or would choose to give him as an evidence that he had any title whatsoever in the said premises, and that as he was in a hurry and going to Europe, he had not time to attend to it, and would authorize Mr. Dutilh to give this defendant a bond and mortgage for the balance of the purchase money; that this defendant then, with this express knowledge on the part of the said complainant of the state and condition of the said title, completed the purchase with the said complainant by executing and delivering to him, somewhere in or about the month of January, one thousand eight hundred and thirty-seven, the deed of conveyance in said bill set forth, and the said complainant at the same time executed and delivered to this defendant the said bond and mortgage for four thousand dollars in said bill referred to, as and for the balance of the consideration or purchase money of the aforesaid premises, through one Eugene Dutilh, as the attorney in New-York of the said complainant.

And this defendant further answering, saith the said Melly, previous to and at the time of entering into the aforesaid contract for the purchase of the aforesaid premises by said complainant, and while he was the attorney of the said complainant in that behalf, and while acting as such attorney, was fully aware of the title of this defendant to the aforesaid premises, and that he, this defendant, had only a contract from the said Hollisters, for the sale of them to him, by the said Hollisters. That the said contract and purchase of the aforesaid premises were made by said complainant with a full knowledge on the part of his said attorney, Melly, of the circumstances herein in this behalf set forth, and the same was made under the aforesaid contract which this defendant had entered into with the said Hollisters, and with the knowledge of all the risks attending such a contract as this defendant had entered into with the said Hollisters.

And this defendant further answering, saith that he, the said Melly, had also at this time become a purchaser of similar pro-

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perty, and had seen and was aware of the nature of the title, and he also saith that the said complainant was at the time of the execution and delivery of the said deed by this defendant, and of the said bond and mortgage to this defendant, fully and unequivocally in possession of the whole facts of the case herein above set forth, and that the only title which this defendant had to the aforesaid premises was under the aforesaid contract with the said Hollisters, and expressed himself willing to take such title as this defendant had. And this defendant further answering, says he has not the said contract in his possession, and is unable to set forth the terms thereof.

And this defendant further answering, saith he admits that the said complainant did, on or about the first day of August, one thousand eight hundred and thirty-seven, pay to the said Isaac Bell the sum of two hundred and forty dollars for interest due on the said bond, as stated in said bill, but this defendant doth deny that the said complainant paid the same without any knowledge or information that he, this defendant, never had any legal or valid title to the aforesaid property so conveyed to him by this defendant, as stated in said bill, or that he paid the same without any knowledge or information that this defendant was possessed of a contract of sale only of said property, but this defendant has no knowledge or information except from the said bill, whether or not the said complainant paid the said interest without any knowledge or information that by the terms and conditions of said sale, the same was forfeited or void, if the same had then become forfeited and void, but which this defendant in no wise admits, and therefore leaves the complainant to make such proof thereof as he may be advised to do; but this defendant doth deny, for the reasons hereinbefore set forth, that the said complainant paid no interest to the said Isaac Bell upon the said bond, or that he never acknowledged an indebtedness by virtue thereof, since the information was received by him that this defendant had no legal title to the said property so conveyed by him to the complainant, as in that behalf stated in said bill, or that he communicated such information to the said Isaac Bell as soon as the complainant

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was able so to do, by exercising due diligence after the same had come to the knowledge of the said complainant, or that he, the said complainant, then caused notice to be given to the said Isaac Bell, that he said complainant did not hold himself liable to pay said bond and mortgage, as in that behalf stated in said bill, inasmuch as the said complainant knew of the said contract of sale made by this defendant with the said Hollisters at the time the aforesaid contract was made with the said complainant, either personally or through his attorney or agent, the said A. A. Melly, and had actual knowledge at the time of the execution and delivery of the said bond and mortgage, that he, this defendant, had but a contract of sale for the aforesaid premises, and no other title to the same; and the said contract of sale was entered into by said complainant somewhere in the month of May or June, one thousand eight hundred and thirty-six, the conveyance and said bond and mortgage executed and delivered somewhere in or about the month of January, one thousand eight hundred and thirty-seven, and the interest on said bond and mortgage paid by the said complainant to the said Isaac Bell, somewhere on or about the first day of August, one thousand eight hundred and thirty-seven, but whether the said complainant communicated any information to the said Isaac Bell in the premises, or whether he caused any notice to be given at all to the said Isaac Bell, as to his, the said complainant's not deeming himself liable to pay said bond and mortgage, as is in that behalf set forth in said bill, this defendant has no knowledge or information except from the said bill, and therefore leaves the complainant to make such proof thereof as he may be advised to do.

Admits the assignment of the bond and mortgage to Isaac Bell, for a present money consideration, at the same time the conveyance to complainant was executed, to wit, January 27, 1837.

It was admitted by the solicitor for the complainant as follows:—

It is hereby agreed to admit, as proved on the part of the above defendants, the following facts:—That the said James

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H. Bell, in the year one thousand eight hundred and thirty-six, while residing in Sandusky, in the state of Ohio, entered into a written contract with J. and J. M. Hollister, for the purchase from them of the premises mentioned in the bill of complaint in this cause. That the said James H. Bell then paid on said contract and as part of the purchase money the sum of sixteen hundred and twenty dollars. That subsequently thereto, to wit, somewhere in May or June, one thousand eight hundred and thirty-six, at Sandusky aforesaid, the said James H. Bell contracted with the said complainant, through one Andreas Antoine Melly, the agent or attorney of the said complainant, for the sale to the said complainant of the premises mentioned in said bill of complaint, for the sum of six thousand dollars. That the said Melly, at the time of this contract, was in Sandusky aforesaid, and drew a draft on said complainant, then in the city of New-York, in favor of James H. Bell, for two thousand dollars, part of said last mentioned purchase money, which draft was accepted by said complainant, and the same paid by said complainant to said James H. Bell, when the same came to maturity. That at the time of the said contract by said Bell with said Hollisters and since, the legal title was and is in the original proprietors of the town, Isaac Mills and the heirs of Tulman Wildman, who contracted to sell the premises with other premises to Messrs. Camp, Nichols and others, who contracted to sell to J. and J. W. Hollister, who contracted to sell to said J. H. Bell. That in the month of January, one thousand eight hundred and thirty-seven, the said James H. Bell came to the city of New-York, and then saw the complainant, who was shortly to leave the city for Europe. That the said James H. Bell then executed to the said complainant the deed set forth in said bill of complaint, and the said complainant thereupon through Eugene Dutilh, then his attorney in New-York, executed and delivered to the said James H. Bell the bond and mortgage in said bill mentioned, and who, for the sum of three thousand and five hundred dollars, then paid to him by the said Isaac Bell, assigned the said bond and mortgage to the said Isaac Bell. That the said complainant

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paid one year's interest on the said bond and mortgage to the said Isaac Bell, on or about the first day of August, one thousand eight hundred and thirty-seven, amounting to the sum of two hundred and forty dollars. That the said James H. Bell was able to secure, and that the said Isaac Bell could have secured from the said James H. Bell the amount of said bond, had the said Isaac Bell, previous to the intimation to him by said complainant, as stated in said answer of said Isaac Bell, been informed of any such alleged want of title in the said James H. Bell, but that the said James H. Bell, at that time, was and has since continued insolvent. It is also agreed, that the answer of the said James H. Bell be deemed to have the same legal effect as if it were the answer of the said Isaac Bell.

N. DANE ELLINGWOOD,

March 22d, 1843.

Sol'r for complainant.

It is further admitted, that the bond and mortgage executed by the complainant, and referred to in the pleadings in this cause, were assigned to the defendant, Isaac Bell, on the 27th day of January, one thousand eight hundred and thirty-seven, who then paid therefor the sum of three thousand five hundred dollars in money, in good faith, and without any intimation of any equity or claim of equity on the part of the complainant Stainer, in respect to said bond and mortgage.

N. DANE ELLINGWOOD,

March 22d, 1843.

Sol'r.

It was admitted by defendant's solicitor as follows:—

It is hereby agreed to be admitted on the hearing of this cause, that James H. Bell, one of the defendants in this suit, never had any deed or conveyance to him of the property contained or set forth in the deed from the said James H. Bell to Edward Stainer, the complainant in this cause, except from the said Edward Stainer, and a copy of which is set forth in the bill of complaint filed therein. That prior to the time of the execution of the deed in the said bill mentioned, and in May, one thousand eight hundred and thirty-six, the said James H. Bell had a written contract in the nature of a conditional sale

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from J. and J. W. Hollister, from them to him of the aforesaid premises, in which the said James H. Bell, at the time of the execution of the said contract, paid the sum of one thousand six hundred and twenty dollars, part of the consideration or purchase money, but neglected to pay the balance of said consideration money, and that the said James H. Bell never held any other muniment of title to the said premises; that the said contract has been unperformed by the said James H. Bell by reason of the non-payment by him of the balance of said consideration money, and that the said James H. Bell never had possession of said premises under said contract, nor had any right to the possession thereof at the time of the execution of the said deed. That the bond and mortgage now held by Isaac Bell, a defendant herewith, and executed by Edward Stainer by his attorney, are the same bond and mortgage that were received by the said James H. Bell, as a security for the payment of the consideration money for the premises stated or set forth in the said deed to Edward Stainer from the said James H. Bell.

A. G. ROGERS,
Sol'r for def'ts.

Dated April 13, 1843.

The cause was brought to a hearing before the assistant vice-chancellor of the first circuit in May, 1843. But one witness was sworn; his testimony was as follows:—

Anthony A. Melly, of the city of New-York, being duly sworn, says that he was in the city of Sandusky, Ohio, in the spring or early in the summer of 1836, and he there saw Mr. James H. Bell, a defendant in this suit. And deponent further says, that he then told the said Bell that Mr. Stainer, the complainant, wanted to invest some money in lots in Sandusky. Mr. Bell said either that he had some lots or would buy some lots for Mr. Stainer, and he showed deponent the lots so to be sold to the said Stainer; he also marked some lots on a map as being lots to be sold to the said Stainer. Deponent did not know whether the lots belonged to Mr. Bell or not. Deponent informed the said Bell that Mr. Stainer had authorized deponent to permit the said Bell to draw upon the said Stainer for

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one-third of the purchase money, the balance thereof to be left on bond and mortgage. And deponent says, that previous to that time, the said Bell had informed this deponent that he had purchased lots for him in Sandusky. The said Bell received on account thereof about nine thousand dollars from deponent; at the time the deponent conversed with the said Bell as aforesaid, Bell said nothing about the title either to Stainer's lots or deponent's lots. Bell never said any thing to deponent as to what title the said Bell had, either to the lots so sold to Stainer or sold to deponent. The said Bell never said any thing to deponent as to any agreement which he held for the purchase of said lots, or either of them. That Bell never said any thing to deponent about the titles. Bell said he would send the paper titles to New-York. Deponent does not recollect whether the said Bell said he would send such titles immediately or not. It was more than a year after deponent had paid the money aforesaid to Bell, and Bell had informed this deponent that he had made purchases for him of lots in Sandusky, that deponent first learned that the said Bell had no deed to the said lots so sold to deponent. Deponent says, that he dares say that it was more than a year, or at least some time, a long time after Mr. Bell had sold the lots to Mr. Stainer, that deponent first learned that Bell had never had any deed for said lots. At the time of the sale of the lots by Bell to Stainer and deponent, deponent understood that the titles thereto were those to be perfect and good as a matter of course; and deponent says, that when he asked the said Bell in the spring or summer of 1836 for his title deeds, the said Bell said that he could not give them to him then, because the register was absent, or something to that effect. In the purchase of said lots for deponent, the said Bell played a trick upon deponent.

This deponent, on *cross-examination*, further saith, there was no written contract between myself and Bell for the purchase of the lots for Stainer; did not understand that Bell had a contract for the sale of the lots to Stainer. Deponent never searched for the title to these lots to Stainer. That deponent will not be positive that it was a year before he first heard that

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Bell had no title for the lots sold to Stainer; it was some time afterward, it was in January, 1837, or after that time, that I first heard he had no title to these lots sold to Stainer. It was after he first came to the city from Sandusky. This information I got from Stainer himself.

And on further *direct examination*, deponent further says, that in acting and negotiating with Bell as aforesaid, in regard to the lots sold to Stainer and deponent, this deponent treated the said Bell with the most unlimited confidence. It may have been by possibility much more than a year that I first heard that Bell had no title to the lots sold Stainer. Deponent says that he thinks Stainer was the first who told him about it. It was after deponent returned from Europe, in the summer of 1838, he now thinks, that he first heard that Bell had no title to the lots sold to Stainer.

On *cross-examination*, deponent says, he believes it was in January, 1837, he got from Bell the deed for the lots sold him by Bell. Yes, it must have been in January.

On the 4th September, 1843, the assistant vice-chancellor decreed that said bond and mortgage be delivered up to the respondent to be cancelled.

From this decree the appellant appealed to the chancellor, who, on the 27th May, 1846, affirmed said decree with costs.

Isaac Bell thereupon appealed to the court of errors, which appeal by due course of law was transferred to this court.

*A. G. Rogers, Attorney, and
Samuel Stevens, Counsel, for appellant.*

First. The respondent must be confined to the case made by his bill. He cannot sustain his bill by a resort to *any other ground or act of fraud* than that alleged in his bill.

Second. The only fraud alleged in the bill is, that James H. Bell, *at the time he agreed to sell the premises, pretended to be the owner thereof*; that he never had any legal or equitable title whatever to said premises, but *so pretended* to be the owner thereof to defraud the respondent; that he only had a contract of sale thereof from the owner, which contract was only in

the nature of a conditional sale; and that he concealed the existence of said conditional sale to defraud the respondent. (*Original bill*, p. 3, *folios* 1, 2; p. 5, *folios* 11, 12; *Amended bill*, p. 17, *folios* 1, 2; pp. 18, 19, *folios* 9, 10, 11.)

Third. The respondent wholly failed to make out the case of fraud alleged in his bill.

1. Fraud is not to be presumed. On the contrary, the law presumes every man to be guiltless of fraud; free from all guile. And this presumption will prevail, and protect those attempted to be charged with fraud, until it is repelled by express, clear, and unequivocal evidence of guilt; and this evidence must consist of either direct proof of fraud or proof of such circumstances as are necessarily inconsistent with the innocence of the party charged with the fraud. (*Kinlock v. Palmer*, 1 *Mill's S. C. Court Rep.* 224; *Fort v. Metayer*, 10 *Martin's Rep.* 349, 436; 8 *Peters*, 244; 12 *do.* 178.)

2. Keeping this principle in view, we humbly insist the evidence fails to show that James H. Bell pretended to be the owner of the premises at the time of the agreement to sell for the purpose of defrauding the respondent.

3. The evidence also fails to show that James H. Bell concealed the fact that the contract of sale to him was conditional, to defraud the respondent, or that he concealed it at all.

4. The answer of James H. Bell positively denies that he pretended to be the owner of the property for the purpose of defrauding respondent, or that he concealed the nature of his contract for the like purpose, or that he concealed it at all. This answer is not disproved by the evidence of Melly, the only witness sworn in the cause; and if it were, the testimony of one witness would not be sufficient. Besides, all the circumstances in the case support the answer. James H. Bell was then a man of character, property and responsibility, and expected to remain so, and could have no object in committing a fraud which could have been discovered in twenty-four hours, and which must, and he knew must, necessarily be discovered when an examination of the title should be made. He never used any persuasions to induce respondent to purchase, never

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even asked him to do so, suffered the agreement to remain a mere honorary agreement, never hurried it through or evinced the least desire to get the bond and mortgage, (two-thirds of the purchase money,) delayed eight months to give the deed and receive the bond and mortgage, in order to get his title completed, and then only gave it at the *request* of the *respondent* himself. In common parlance he was the owner, although he had not the legal title for it—had paid down \$1,620 toward it, and was able to pay the residue. Under such circumstances fraud could not be imputed to him for contracting to sell it as the owner. (2 *Story's Equity Jurisprudence*, sec. 1528; *Stafford v. Bryan*, 3 *Wend.* 532, 537, 538; 1 *Clarke's Rep.* 408.)

5. The respondent's agent knew, or had ample and easy means of knowing, the state of the title to this property. He could have examined the register's office himself. Courts of equity will not listen to an allegation of fraud from a party who might have protected himself against the alleged deception by the exercise of the least degree of common prudence. In such cases the allegation of fraud is looked upon as altogether an after thought, and the court will not relieve a party against an alleged fraud, against which he might, by the slightest exercise of his own powers, have protected himself. (*Griffith et al v. Kempshall and others*, 1 *Clarke's Rep.* 578; 1 *Story's Eq.* § 191; 2 *Kent's Commentaries*, 484, 485, 3d ed.)

6. But if it be admitted that James H. Bell at *the time of the agreement in May, 1836*, did actually conceal this contract of sale, still such concealment was no fraud, for it was, *at least so far as regards the bond and mortgage*, the concealment of an immaterial fact taking place eight months before the execution of the bond and mortgage, *during which time* the respondent must be presumed to have looked into the title, or to have been informed with regard to it. (1 *Edward's Ch. Rep.* 442; *Littel's Rep.* 275; *Dess.* 134; 1 *Bibb* 235; 3 *Vermont Rep.* 272; 3 *Wend.* 532; 2 *Story's Eq. Jur.*, § 1528, p. 914; *Greenly v. Cheevers*, 2 *East*, 4 *Johns. Rep.* 126; *Woodcock v. Bennett*, 1 *Cow.* 742.)

 Was a contract to sell and convey land at a future

period. Deed not given till eight months afterward; no time was fixed for performance. —

Fourth. The accepting of the deed by the respondent with covenant of warranty, eight months after the contract of sale, and without objections to the title, merges the contract of sale and the alleged false representations and suppressions at the time of such contract, and they being merged, were at an end; hence it became necessary for the respondent to *show* misrepresentation or concealment in *January*, 1837, when the deed was executed and the bond and mortgage given. But not only are *no* misrepresentations or concealment at that time shown, but the respondent was then distinctly and expressly told by James H. Bell the true state of the title. If no fraud was practiced *at the time* the deed was accepted and the bond and mortgage in question given, it cannot be pretended that the latter were fraudulently obtained. See *James Bell's answer*, *fols.* 14, 15, 18, 19, which, being responsive to the bill, is conclusive on that point. (*Griffith, &c., v. Kempshall, &c.*, 1 *Clarke's Rep.* 571; *Miller v. Long*, 3 *A. K. Marsh Rep.* 334; *Cradock v. Shirley*, *ibid.* 288; *Royston v. Scheckelford*, 5 *Littel's Rep.* 239; *Creigh v. Beeton*, 1 *Watts & Serg. Rep.* 83; *ibid.* 442; *Houghtaling v. Lewes*, 10 *Johns.* 298; *Howes v. Barker*, 3 *Johns.* 498; *margl. p.* 506.)

Fifth. The payment, by the respondent to the appellant on the 1st of August, 1837, of the interest then due on the bond and mortgage, was an acknowledgment and ratification of their validity, and should preclude the respondent from afterward disputing the same, in the hands of the appellant, who is a *bona fide* assignee paying therefor a present valuable consideration.

1. It is no answer to this position, that the respondent had not then ascertained that the title was defective. He should have ascertained it. It was fifteen months after the contract of sale, and seven months after the bond and mortgage had been given and assigned to the appellant.

2. If the respondent did not, in fact, then know that the title was defective, it was owing to his own gross negligence, and

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where, by such negligence, either he or a *bona fide* assignee of the bond and mortgage is to suffer, surely the one guilty of the negligence should suffer. It is conceded that had the appellant, *at that time*, or previous to the first intimation of Bell's want of title, had notice that the respondent claimed the bond to be void, he could have secured himself for the money he had paid the assignor for the bond and mortgage. The assignor was then responsible, and so continued down to shortly before the first intimation of the respondent's alleged equity, August 23, 1838. He has since, and before the appellant had any notice that the respondent intended to question the validity of the bond, failed and become utterly insolvent. (*Goodman v. Eastman*, 4 *New-Hampshire Rep.* 455 ; *Chit. on Contracts*, 224, *note.*)

3. Certainly the respondent could not, under these circumstances, be permitted to question the validity of the bond, if he had paid the interest on it for one year to the assignee, after he knew the title to the property had failed. He therefore alleges that he did not then know it, but he has not given one particle of proof to sustain that allegation. He should be required to give full and clear proof, not only that he did not then know it, but that with due vigilance and diligence he could not have ascertained it, before equity will permit him to defeat the rights of a *bona fide* assignee.

4. But the respondent did know, at the time he paid the interest, what the state of the title was. This is expressly sworn to in the answer of James H. Bell, which is responsive to the bill, and is therefore conclusive on that question. (*Waller v. Quigg*, 6 *Watts*, 87 ; *Wigg v. Wigg*, 1 *Atk.* 334.)

☞ That Bell had an equitable title, see 4 *Hill*, 635 ; 7 *Vesey*, 274 ; *Champion v. Brown*, 6 *Johns. Ch.* 398. As to the effect of a quit-claim deed, and one with warranty, see 1 *Cow.* 613-711 ; 11 *Johns.* 91 ; 14 *do.* 193, *McCracken v. Wright*. Want of title not sufficient without fraud. *Sugden on Vendors*, 347, 348, 349, 350. ☞


☞ *S. Stevens*, in reply.—If a man sell and convey land by quit-claim deed, with no other representation than that from the act of selling, purchaser has no remedy either at law or in

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equity in case of defect of title. (5 *Paige*, 306-7.) And if he conveys with warranty, the only remedy is on the covenant. 18 *J. R.* 560-1.

As to what must be alleged or no relief.—*Story's Eq. Pl.* § 27, 241, 251, 255.—This bill should have been dismissed on demurrer; and if so, objection may be taken now. *C. & H.* 297-8.

A. V. C. says he does not believe the answer. He had no right to say that. He was bound to believe it, until disproved by two witnesses, or evidence equivalent.—Complainant makes defendant his witness. 2 *Story Eq.* § 1528; 13 *Ves.* 119.

Complainant was bound to inquire as to validity of title. 

N. Dane Ellingwood, Attorney and Counsel for respondent.

First. The bond and mortgage which the respondent seeks to have cancelled were procured by fraud.

1. James H. Bell represented himself to be the owner of certain lands deeded to the respondent, and as a part of the consideration thereof, the respondent gave the bond and mortgage in question to James H. Bell.

2. The said James H. Bell never had either the legal title, or the possession of the premises conveyed by the deed; and the only interest which he had therein was under and by virtue of a contract of sale, the existence of which he concealed from the respondent.

Second. The bill of complaint sufficiently sets forth the allegations of fraud, which, although denied in part by James H. Bell in his answer, are sustained by the testimony, and by the facts and circumstances of the case.

Third. Having so represented himself to be the owner of the land pretended to be conveyed by the deed, James H. Bell was guilty of fraud; unless it be true that at the time of the agreement to sell, he did inform Mr. Melly, the agent of the respondent, that he was not the legal owner, and held a contract of sale only for the land; or unless it be true that he, James H. Bell, did, in January, 1837, personally so inform the respondent. James H. Bell, in his answer, avers that he gave such information both to Mr. Melly and the respondent himself;

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this averment is unsustained by any proof, and is manifestly untrue and disproved by the testimony of Mr. Melly and the facts and circumstances of the case.

1. Mr. Melly, the witness, denies that he was informed that James H. Bell had a contract of sale; and to the contrary, he says that Bell pretended that he could not show witness his title deeds, because the register was absent. (*See pages 40 and 41 of the case.*)


2. The facts of the case show the falsity of this averment in James H. Bell's answer. Had it been true, the respondent would have taken an assignment of the contract, not a deed. The respondent could not have enforced the contract, or procured a title from the legal owner by means of the deed alone. (*Jackson ex dem. v. Demont, 9 J. R. 55.*)

3. Besides, it is manifest that the object of James H. Bell was to raise money upon the mortgage; to effect this object, it was necessary for him to conceal the fact that he had a contract of sale only.

Fourth. Isaac Bell took an assignment of the bond and mortgage, subject to all the equities that existed between the respondent and James H. Bell. (4 C. 722.)

Fifth. Those equities were not waived or impaired by the payment of interest upon the bond after the assignment made to Isaac Bell, inasmuch as the respondent paid it in ignorance of the fraud which had been practiced upon him.

Sixth. The appellant has no equities as against the respondent.

 Pretended to be owner by the words of the deed—so false pretence at time deed was given. (3 *East*, 200; 9 *J. R.* 55.)

Should have assigned the contract. 

JEWETT, Chief J. The object of the complainant's bill was to set aside, and procure to be cancelled, a bond and mortgage, executed by the complainant to James H. Bell, one of the defendants in the court below, and which he assigned to Isaac Bell, the appellant, on the ground of fraud. The bond and mortgage as is alleged and admitted to be true, were given to secure the payment of two third parts of the purchase price of

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three lots of land in the city of Sandusky, state of Ohio, which J. H. Bell contracted with the complainant to sell him in June, 1836. The fraud, as alleged in the bill, is, that J. H. Bell, never having had any legal or equitable title to the premises, except such as he derived through a contract for the purchase thereof of the owner, which had become forfeited, and which he concealed from the complainant, with the view and intent to defraud him at the time he made the contract with the complainant to sell him the premises, and received \$2,000 toward the purchase price thereof, and with the view and intent to defraud him, *pretended to be the owner thereof*. The defendants answered under oath, as called for by the bill.

J. H. Bell, in his answer, positively denies that he ever pretended to be the owner of the premises, *with the view and intent* to defraud the complainant; or that he ever pretended to be the owner thereof, or that he concealed the existence of the alleged contract of sale, or conditional sale, as called in the bill, *with the view and intent* to defraud the complainant, or that he concealed it at all from the complainant. It appears that J. H. Bell, at the time of the contract, resided at Sandusky, and that the complainant resided in New-York: that one A. A. Melly, as the agent of the complainant, was at Sandusky, and in his behalf made the contract with J. H. Bell for the purchase of the premises, and drew upon the complainant in favor of Bell for \$2,000, in part satisfaction of \$6,000, agreed upon as the consideration of the purchase.

J. H. Bell further in his answer says, that Melly, previous to and at the time of making the contract, and while he was such agent and acting in that character, was fully aware of his title to said premises, and that he had only a contract from J. and J. W. Hollister for the sale of them to him; that the contract between the complainant and him was made with a full knowledge, on the part of Melly, and that the same was made under said contract which he had entered into with said Hollisters.

This answer thus far is responsive to the bill, and, as such, evidence of the truth of the matter so set up: the inquiry then

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follows, is it overcome by the testimony in the cause? The rule on this point is admitted to be, that unless it be overcome by the testimony of at least two witnesses, or by one witness and by circumstances, equal to another, the answer must prevail.

The only witness relied on to impeach the answer by his evidence is Melly. He says, in the spring or early in the summer of 1836 he met J. H. Bell at Sandusky, and then told him that Stainer wanted to invest some money in lots at Sandusky: that Bell either said that he had some lots, or would buy some lots for Stainer, and showed him the lots so to be sold to Stainer, and marked lots on the map so to be sold to him; that he did not know whether the lots belonged to Bell or not; he told Bell that Stainer had authorized him to draw on Stainer for one-third of the purchase money, the balance to be left on bond and mortgage: that Bell said nothing about the title he had, nor anything as to any agreement which he held for the purchase of said lots. He said he would send the paper titles to New-York. That he did not learn for a year or more after the sale that Bell had no deed for the lots. At the time of the sale, Melly understood, as a matter of course, that the titles thereto were to be perfect and good; that when in the spring or summer of 1836 he asked for his title deeds, Bell said that he could not then give them to him, as the register was absent, or something to that effect.

This is all of the testimony which affects this question, unless it may be that the contract for the sale of the lots was merely verbal, not reduced to writing, and that Melly drew the draft for \$2,000 toward the price, and delivered it to Bell.

The fact that Bell assumed to sell the lots is not denied, although the fact that he *pretended* to be the owner thereof is professed to be. It must rest upon a distinction which is evidently intended to be taken by the answer, between the position of a person when contracting to sell and convey a piece of land without in words alleging himself to be owner, and that of one who, when making the like contract in words, announces himself to be the owner; a distinction too slender and nice, I apprehend, for any principle of law or equity to see or comprehend.

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The acts of Bell, as detailed in the answer above, are sufficient, in my judgment, to say that he occupied the position toward the complainant of pretending to be the owner of the lots. He contracted to sell, and I entirely agree with the assistant vice-chancellor, that it was not necessary for Bell to use words to hold himself out as the owner. The answer in this respect must be understood as denying merely that Bell in words told Melly that he was the owner; and in that sense there is no conflict between it and the testimony of Melly, or the circumstances of the transaction. The answer denies that he concealed from the complainant the existence of the contract of sale which he, Bell, had for the purchase of the lots.

And he goes further, he does not say in so many words that he *told* Melly that his title rested in a contract with the Hollisters for a purchase of the premises; but he says he had only such contract, and that Melly was fully aware of his title; and also that he had only such contract; and with full knowledge on the part of Melly of these facts, the complainant, by him, entered into the contract of purchase with him, Bell. That Melly knew of the contract under which Bell claimed the premises, or that he claimed at all under a contract, and not under a deed, is fully contradicted by the testimony of Melly. But I do not see in this case any circumstances to corroborate Melly's testimony in that particular, beyond what may be inferred from the ordinary conduct of most men, attentive to their own interests, and security in dealing, in any other year than 1836, would have been the conduct of the complainant, or of Melly his agent, if he did know upon what baseless foundation Bell's title rested, which I do not think can be allowed at any time, as circumstantial evidence to overthrow the positive evidence of an answer under oath responsive to a bill: and more especially in favor of a party confessedly entering into a mere verbal contract with a man residing in a distant place, for the purchase of lands there situated, upon so large a consideration as \$6,000; and advancing one-third of the sum at the time, without making the slightest examination as to the title, or, so

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far as it appears, without any definite time fixed by the contract for its consummation.

Therefore, in my opinion, unless we say that the evidence in the case shows that Melly, at and before the time he entered into the contract with Bell, had knowledge that Bell had no other title to the lands in question than such as the contract with the Hollisters passed to him, and upon that ground, and no other, Bell assumed to be the owner, we should fail to give the answer the force and effect to which it is entitled by well settled principles. If I am right in this conclusion, the case shows that Bell was not guilty of any fraudulent concealment, that his title rested upon the contract with the Hollisters, or any fraud in holding out to Melly that he was then the owner of the premises. But this is not all. Up to January, 1837, the parties were under no legal or equitable obligation with each other to perform the contract. Bell was liable to refund the \$2,000 on demand. What took place at that time we have not only the answer of Bell, but it is admitted by the stipulation of the solicitor for the complainant, so far that in that month Bell came to New-York, then saw the complainant, who was shortly to leave the city for Europe; that Bell then executed to the complainant the deed set forth in the bill, (which bears date the 1st of August, 1836;) that the complainant thereupon, by his attorney, Dutilh, executed and delivered to Bell the bond and mortgage in question, and who thereupon assigned the same to Isaac Bell for the consideration of \$3,500, then paid to him by the latter.

The answer goes further; it alleges that he, J. H. Bell, at that time told the complainant that he could not give him any other paper than a release, or quit-claim; of his right and title under the contract with the Hollisters; that he had not then the legal title to the premises, and only held said contract of sale; and that he would not then make a legal title. That the complainant said he would be satisfied with any thing that Bell could or would choose to give him, as an evidence that he had any title whatsoever in the premises; and that as he was in a hurry and going to Europe, he had not time to attend to it,

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and would authorize Mr. Dutilh to give Bell a bond and mortgage for the balance of the purchase money; that Bell then completed the purchase with the complainant by executing and delivering to him the deed, and received the bond and mortgage executed by the complainant by his said attorney, to secure the payment of \$4,000, the balance of the purchase money. It is said that this statement is not credible; but it is responsive to the bill, and entitled to be credited as true, unless there is competent evidence in the case to show it false. What evidence of that character is there in the case? There is not the evidence of any witness on the subject, substantially; all the facts in that respect stated in the answer, except that which relates to the conversation alleged to have taken place in relation to Bell's title, and his ability to convey a valid title, is admitted. It is said that the giving of a deed by Bell, with a covenant of warranty for quiet enjoyment, is a declaration that he was the owner in fee simple absolute. I do not see that why may it not as well be taken as showing that the complainant reposed full confidence in Bell's ability, at some future day, to complete his title to the land under his contract with the Hollisters, and a reliance upon his integrity, as well as pecuniary interest, so to do, by which the title would enure to his benefit, and thereby save any breach of his covenant which might otherwise thereafter occur; and if he failed thus to complete his title, he could safely fall back upon the covenant of warranty, and obtain ample redress; and that Bell, fully believing that he could and should thereafter complete his title, did not hesitate to give such deed. But again, it is said, if Bell had given the complainant such information in regard to his interest as stated in the answer, and intended honestly to transfer to him such right as he had, he would have executed an assignment of the contract which he held for the lots, leaving the complainant to fulfil the unpaid purchase money on the Hollisters, and taken his personal obligation for the residue of the \$4,000.

I am not able to see a foundation for such inference strong enough to impugn the truth of this answer. So far as the case

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shows the facts, admitting the answer in this respect to be true, and conceding to Bell an honest intention to convey to the complainant what interest he had in the premises, I do not think it at all clear that men of ordinary sagacity would have transacted that business in the manner suggested.

It does not appear how much was due upon the contract to the Hollisters, whether more or less than \$4,000; nor certainly but that the contract was forfeited, and the Hollisters absolved from its performance. It does appear that there had been a breach of it on the part of Bell—he had not paid according to its terms. Stainer, as I infer from the fact of his paying subsequently one year's interest, and that the \$4,000, by the contract was to be kept on bond and mortgage, was to have some time thereafter to pay. He was on the eve of going a journey to Europe. Now under these circumstances, living at the distance he did from the premises, probably a stranger to the Hollisters, having confidence in the pecuniary responsibility as well as the honesty of purpose of Bell, is it not quite as probable that he would prefer to take the deed, and give the bond and mortgage, than to take an assignment of the contract, and take upon himself the trouble, responsibility, and risk of obtaining a title through it. He might well have supposed that Bell, by his covenant in the deed, would feel a desire to obtain a title to save it; and that being a neighbor to, and acquaintance of the Hollisters, would, in case of a technical forfeiture of the contract, be more likely to obtain the title under it than he would, situated as he was.

Other considerations have been suggested in regard to the transaction of giving the deed, from which references have been drawn to impeach the answer in that particular, which seems to me to be too light to be indulged for such purpose. It seems to me, therefore, that the case fails to show that J. H. Bell was guilty of the fraud charged in the bill, either in making the contract or in its consummation, by giving the deed and taking the bond and mortgage; and that it is unnecessary to consider whether the complainant, by any act of his, subsequently waived

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or barred his defence to the bond and mortgage in the hands of Isaac Bell.

I am of opinion that the decree of the court of chancery, and that of the assistant vice-chancellor, should be reversed, and that the bill should be dismissed with costs of the court of chancery.

DECISION—Decree of the court of chancery, as also that of the assistant vice-chancellor, reversed, and bill dismissed with costs in the court of chancery—*unanimously*.

NOTE.—JEWETT, C. J. *Held*, that the case failed to show that James H. Bell was guilty of the fraud charged in the bill, either in making the contract or in its consummation by giving the deed and taking the bond and mortgage; and that it was unnecessary to consider whether the complainant, by any act of his subsequently, waived or barred his defence to the bond and mortgage in the hands of Isaac Bell.

Not reported.

PARTRIDGE, appellant, *agt.* MENCK and others, respondents.

Questions discussed.

1. Whether a "*trade mark*," which has become known, is a species of property which will be protected by the court of chancery?

2. Whether any unauthorized use of such trade mark, which shall have the effect to take from the proprietor thereof the lawful advantage which he might derive from the same, is an infringement of the right of such proprietor, which will warrant the interference of the court?

3. Whether it is the same in principle, whether the trade mark be used *without change*, or whether it be *imitated*, or used in part with some colorable difference, if it is still calculated to mislead the public?

4. Whether Partridge, as purchaser from and successor of A. Golsh, had an exclusive right to the use of the imprint of the "*bee-hive*," and the words "*A. Golsh*," which composed the material parts of the label and designation of the "*Golsh Matches*?"

5. Whether the respondents, by the similarity of their label with that of A. Golsh, were deceiving the public by selling matches manufactured by them as and for those manufactured by the appellant, and thereby injuring his business?

Partridge *agt.* Menck and others.

The bill was filed in this cause by Partridge, the appellant, before the vice-chancellor of the first circuit, October 31, 1846, and a subpoena and injunction were thereupon issued and served upon the defendants.

The bill stated that Partridge, for a large and valuable consideration, in the month of January, 1844, purchased from A. Golsh his interest in the business of manufacturing friction matches in the city of New-York, including all the property which was in use therein, and the good will of said business, together with the right of using the name of said Golsh and his labels, and the plates for printing. That by the terms of the agreement, Golsh relinquished entirely to the appellant and his assigns his entire business and property, and covenanted not to carry on the same or a similar business in this country, and granted to the appellant the exclusive use of his label aforesaid, and of the name of said Golsh, covenanting that appellant was the only person to whom he had communicated his process aforesaid. Golsh introduced appellant to his customers as being his successor in business, and the sole manufacturer of matches, such as he had been accustomed to sell; and shortly after departed for Europe, where he then was. That afterward the business became extensive and valuable to the appellant; that the matches he manufactured were known as Golsh's matches, and sold to the same customers that formerly dealt with said Golsh, besides a great many new customers, who had been induced to purchase in consequence of the reputation of the said Golsh match in market.

That the label used by said Golsh had an imprint of a bee-hive, and the words "A. Golsh, friction matches, 124 Twelfth-street, between 5th and 6th Avenues, New-York," which label had been used by appellant since his purchase of Golsh without variation. That appellant had a label for a particular kind of match without sulphur, which had the same vignette or imprint of the bee-hive, with the words, "A Golsh, premium matches, without sulphur, 3 Cortlandt-street and Twelfth-street, New-York;" the first named place being a shop, which the said Golsh used for convenience in the retail business in the lower part of

Partridge *agt.* Menck and others.

the city, and which appellant had always used for the same purpose.

The bill then charged that the defendants had recently been offering matches for sale, with a label made in imitation of that used by appellant, and put in boxes made of paper similar in appearance and color to that used by appellant, and calculated to deceive appellant's customers, and other dealers; and to induce them to suppose that their matches were the real Golsh matches, and had sold the same to a large amount, representing them to be such; and had interfered with appellant's business, and impaired his sales to a large extent.

That the label contained the bee-hive aforesaid, which was a well known mark of the Golsh matches, and had been always used by said Golsh and appellant, and by no other person in the manufacture and sale of friction matches, and was the principal mark depended upon by many of appellant's customers. That for some time the defendant's label had the words "MENCK & BACKES, LATE CHEMISTS to A. GOLSH, FACTORY IN 8th AVENUE 46th-STREET; ALSO IN 8th AVENUE 163d-street, NEW-YORK;" recently the form had been altered, so as to read thus: "MENCK & BACKES' FRICTION MATCHES, MADE BY J. BACKES, LATE CHEMIST FOR A. GOLSH," the words "Menck & Backes, made by J. Backes, late chemist," being covered by the lid of the box so as not to be readily observed, and the name of A. Golsh being in large letters; and this was the label then used, retaining the bee-hive.

The bill then proceeds to charge the defendants with having publicly advertised their matches, and had effected large sales to persons who were under the belief, derived from such advertisement and labels, that the matches were made by the successor of said Golsh in his business.

That Menck was never acquainted with the business of making matches, nor was he a chemist, and was never employed by A. Golsh; that Backes was an ignorant German, and was not a chemist, but was in the employ of A. Golsh, and afterward by appellant, chiefly in carting matches about town—never employed to mix ingredients.

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That the matches manufactured by defendants were of inferior quality, and the sale of them injured the reputation of the Golsh matches, which impaired the demand for the latter.

That appellant had many foreign customers, particularly in Spanish countries, in Cuba, Mexico, and South America, who had been entirely misled by purchasing matches of defendants, supposing them to have been the Golsh matches, whereby the business of appellant had been seriously affected. That unless defendants were restrained in their course of proceeding appellant would be greatly injured in his business, especially as defendants had little or no responsibility.

The defendants, William Menck, Jacob Backes, and Augustus A. Samanos, put in their joint and separate answer, and denied that dealers in matches depended upon the label in purchasing matches, as stated in the bill.

That A. Golsh did, as defendants were informed and believed, for a number of years after he commenced the business of manufacturing matches, use and adopt another and different label from either of those referred to in the said bill of complaint; and that he did not, in the management of his business, consider the label as of any particular importance in the reputation of the said matches, or otherwise connected with the manufacturing thereof; that the label so used by him had an imprint thereon of the British coat of arms, and the words "W. JONES' Royal Patent MATCHES, warranted to ignite, drawing them lightly over the bottom of the box, and to keep in any CLIMATE, *Strand*, 5, No. 291;" which said label was used to some extent by the said complainant.

That if said Golsh did introduce the complainant to his customers as his successor, the defendants insisted that he did not thereby give the complainant any exclusive right to the business, nor to the label which he had adopted and used as aforesaid. And denied that complainant in his purchase, or in any other way or manner, became entitled to the perpetual and exclusive right to use the aforesaid label, and vignette aforesaid. That if complainant ever had any such exclusive right, it was given for a definite period of time, which had then elapsed.

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They denied that A. Golsh had not disclosed to any other person his mode of manufacture; but on the contrary, the said Jacob Backes answering upon his own knowledge, and the other defendants upon information and belief, said, that some time about one year previous to the time of the alledged sale and assignment by said A. Golsh to the complainant, said Golsh did communicate, disclose, and make known to defendant Backes the ingredients and also the mode of manufacturing the chemical composition with which the said matches were made; and that the fact that defendant Backes was acquainted with the properties and the mode of making said chemical composition was at or about the time of the purchase by the complainant known to him, and that complainant hesitated and expressed an unwillingness to close the bargain, because of such fact.

They denied that the label, "A. GOLSH, FRICTION MATCHES, 124 *Twelfth-street, between 5th & 6th Avenues, New-York,*" with the imprint of a bee-hive thereon, had been used by the complainant without variation, or that it was then used by the complainant: on the contrary, they said that the complainant used in all five different kinds of labels for the matches manufactured by him, some with, and some without the vignette of the bee-hive; and also, that said A. Golsh had another label, which he used for a long time for the purpose of bringing his matches into repute, and that the complainant had not, and never had, the exclusive right to use the name of said A. Golsh, or the imprint aforesaid, so as to prevent the defendants from using the same in the way and manner hereinafter particularly mentioned, nor had the said A. Golsh any such exclusive right thereto.

The defendants, Wm. Menck and Jacob Backes, said they were partners in business, under the firm of Menck & Backes, and carried on the manufacture of matches at the corner of 46th-street and 8th Avenue, in the city of New-York, and that they also received orders at No. 163 Eighth avenue, and at other places referred to in the advertisement hereinafter mentioned; that they were daily manufacturing large quantities of matches for sale; and alleged that such matches were in every respect

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superior in quality to those of complainant ; that the same are, and always have been, known to customers and to the public as a different article, and as having been made by different persons, at a different place from those manufactured and sold by the complainant ; that in getting up a label for the boxes in which the said matches were contained, the vignette of a bee-hive was selected by the defendant, Wm. Menck ; and without any concert with the other defendants, and without particular reference to the style and device of the labels used by the complainant ; that he drew the pattern from his own imagination, and without having any one of the complainant's labels before him, and without in any manner designing or intending to infringe upon the complainant's rights, not knowing or believing but that he had as good right to use the vignette of the bee-hive as if the complainant had not in any manner used the same on his labels—a bee-hive being a common and ordinary vignette upon labels, and also upon cards and signs in common use by the public ; and that he had not then, nor had either of the defendants, any knowledge of any exclusive right in the complainant to such vignette or imprint of a bee-hive ; that in using the name of A. Golsh in the connection in which it was used on defendant's labels, the object was to advertise the fact that defendant Backes had been chemist to the said A. Golsh, in his manufactory.

The answer denied that defendants had intentionally put up and sold matches in imitation of complainant, and then proceeds to give the particulars of the difference between the labels of each. Denied the allegations in the bill of having attempted to make sale of matches to any person who was under the belief, derived from defendant's advertisement or labels or otherwise, that they were Golsh's matches.

Jacob Backes denied the allegation in the bill that he had never been employed by A. Golsh, and afterward by the complainant, in mixing ingredients for the composition of matches, or that he had no chemical knowledge of said ingredients ; on the contrary said, that for the space of about one year before A. Golsh gave up the business, defendant mixed the ingredients

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and prepared the said chemical composition for use; that he was informed by said A. Golsh of what the said composition was composed, and directed how to mix the same; and that when A. Golsh sold out as aforesaid, defendant was as well acquainted with that part of the business as said A. Golsh himself was: that defendant afterward continued in the employ of the complainant for the period of about two years, and mixed and assisted in mixing and preparing the said chemical composition for said complainant. Never had been under any agreement with A. Golsh or complainant, or any other person, either express or implied, not to manufacture matches, or to avail himself of the knowledge and information he had acquired for his own benefit.

The answer in response to the bill concluded by denying specifically the inferior quality of defendants' matches; that the sale of complainant's matches was injured as alleged, or that defendants had ever attempted any infringement of complainant's rights, or that complainant's customers, or the public, had been deceived as alleged in the bill.

The following are the labels alluded to—two of complainant's, and two of defendants':—



The bill and answer were under oath.

On the 8th Dec., 1846, on motion of the defendants, founded on the bill and answer, the vice-chancellor, Hon. LEWIS H.

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SANDFORD, dissolved the injunction, and *held*, after laying down certain rules relative to trade-marks, that the defendant's label was not an unlawful invasion of the complainant's trade-mark.

The complainant's matches were sold as "*A. Golsh's*;" the defendants' were sold as the manufacture of a "*late chemist for A. Golsh.*" And any purchaser looking for the "*A. Golsh*" matches, would see at a glance that the defendants' article was not his, but that it came from some person lately his chemist. Though the words "*late chemist for*" were smaller than the words "*A. Golsh,*" on the defendants' label, they were perfectly plain and distinct, and printed in type only a trifle smaller than the capitals used in our recent published reports.

The use of the bee-hive left a shade of doubt in his mind, but it was not sufficient to warrant him in retaining the injunction on the case as disclosed by the answer.

From the order dissolving the injunction the complainant appealed to the chancellor, who, on the 25th January, 1847, affirmed the order of the vice-chancellor, and upon substantially the same grounds.

From the order of the chancellor the complainant appealed to the court for the correction of errors, which appeal was, by law, transferred to this court.

*Dana, Woodruff, and Leonard, Attorneys, and
A. H. Dana, Counsel, for appellant.*

First. A trade mark which has become known is a species of property which will be protected by the court of chancery.

Second. Any unauthorized use of such trade mark, which shall have the effect to take from the proprietor thereof the lawful advantage which he might derive from the same, is an infringement of the right of such proprietor, which will warrant the interference of the court. (*Knott v. Morgan*, 2 *Keen*, 213; *Millinton v. Fox*, 3 *Mylne & Craig*, 339; *Day v. Binning*, 1 *Cooper*, 489; *Croft v. Day*, 7 *Beavan*, 84; *Coates v. Holbrook*, 2 *Sandford*, 586; *Taylor v. Carpenter*, 3 *Story Rep.* 449.)

Third. It is the same thing in principle, whether the trade

mark be used without change, or whether it be imitated, or used in part with some colourable difference, if it is still calculated to mislead the public. (*See the cases above cited, and also, Sykes v. Sykes*, 3 *Barn. & Cress.* 541; *Seton v. Senate*, cited in 2 *Ves. & Bea.* 218.)

Fourth. Nor is it essential that such use should be with fraudulent intent; but if, in fact, the benefit which the owner of such trade mark is entitled to have, is appropriated by another, no matter with what intent, there is a just claim for relief in a court of equity. (*See 3 Mylne & Craig*, 339.)

Fifth. Complainant has such an ownership of the label set forth in the bill, the material parts of which label are the name of A. Golsh, and the vignette of the bee-hive.

Sixth. This label is the only designation of the Golsh matches: the composition cannot be determined by inspection, and customers must therefore depend upon the label.

Seventh. Defendants have used a label which, though not identical with complainants', is nevertheless an imitation calculated to deceive customers, and induce them to suppose that their matches are the manufacture of Golsh, or of his successor in business; and the use of the label is intended, and does have the effect of getting a sale for the articles manufactured by defendants, upon the reputation of A. Golsh, and not upon their own.

1. Defendants have recently commenced business, and cannot be supposed to have acquired a reputation of their own.

2. The name of A. Golsh is the most conspicuous part of the label.

3. If a customer should even examine more particularly, he will find, "J. Backes, late chemist of A. Golsh," which would make the impression still stronger that this is the genuine article.

4. The words "Menck & Backes" are covered by the lid of the box when shut.

5. The vignette of the bee-hive is a mark which would be depended upon by foreign customers, who are more accustomed to trade marks than dealers in this country.

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Eighth. Upon all the circumstances of the case, it being apparent that the course of proceeding, on the part of defendants, must necessarily deprive the complainant, to a considerable extent, of the advantage which he was entitled to as the purchaser of Golsh's establishment, and good will in business, and that the injury is of such a nature as cannot be made the subject of exact calculation, but is likely to be ruinous to complainant: it is a case where an injunction of a court of equity is the only adequate remedy, and the order appealed from dissolving the injunction ought to be reversed.

E. H. Owen, Attorney and Counsel for respondents.

First. If the appellant is entitled to a reversal of the orders of the courts below, and to have an injunction, as prayed for in his bill, it must be either upon the ground that he has an exclusive right to the use of the imprint of the bee-hive and the words *A. Golsh*, or that he has adopted and used them as his trade marks, to distinguish his matches from those manufactured by others; and that the respondents are fraudulently using the same, (or those so nearly resembling them as not to be readily distinguishable by persons dealing in the article,) and deceiving the public by selling matches manufactured by them, as and for those manufactured by the appellant, and thereby injuring him in his business.

Second. The appellant has no such exclusive right. He has neither a patent for the composition of which the matches are made, nor a copyright of the imprint of the bee-hive, nor of the name of *A. Golsh*. The only right which he has is what he derived by purchase from Golsh, and what he has acquired by subsequent use as his trade mark. But Golsh never granted to him the right to use the imprint of the *bee-hive*; all that was granted was the mere right to use his *name* upon the labels. The appellant has not therefore any *better* right to use the imprint of the bee-hive than the respondents have.

Third. The allegation that the respondents have been offering matches for sale with a label made in imitation of that used

by the appellant being denied in the answer, the question of similarity can only be determined by inspection, and it is therefore insisted that the words and imprint of the bee-hive, as used by the respondents upon their labels, are not in imitation of, nor similar to those used by the appellant. Nor is there such a resemblance between them as to mislead or deceive, by causing the public to suppose that in purchasing the respondents' matches they are purchasing those manufactured by the appellant, or A. Golsh. The following, among other things, clearly distinguish the two labels:—

1. The letters on the appellant's label are *black*, and upon *white* ground, while those of the respondents are *white* letters upon *black* ground.

2. The words upon the labels are entirely different. The only word which appears on the appellant's label above the bee-hive, when the lid is on, is *matches*, while upon the respondents' there appear the words, "*late chemist to A. Golsh.*"

3. The words below the bee-hive are also different. Those upon the appellants' being "124 Twelfth-street, between 5 & 6 Av. New-York," while those upon the respondents' label are, "Factory in 8th Avenue 46th st. Also 163 8th Avenue, New-York."

4. If the lids are removed, the words thereunder are different. Those upon the appellant's are "*Golsh Friction*," while those of the respondents' are "Menck & Backes Friction Matches, made by J. Backes."

5. The imprint of the bee-hive, even supposing the appellant to have purchased the same, is different; the appellant's being imperfect in execution, while the other is more perfect, and is surrounded with flowers, with a perspective.

Fourth. The appellant has no right to the sole use of the bee-hive as represented on his second label. There is no sufficient allegation in the bill that he had adopted and used that prior to the time the respondents got up their label. To entitle the appellant to bring that label in comparison with the respondents', he should have averred the prior use thereof as his trade mark.

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Fifth. But even if there were such an averment, still there is no real similarity between that label and the one used by the respondents. The outward appearance of the appellant's 'boxes with the lid on, and that of the respondents' with the lid on, is so *dissimilar*, that it is scarcely possible for any person to be deceived. There is nothing to induce the belief in the mind of the purchaser that he is purchasing the appellant's matches, or even those made by his successor.

Sixth. The printing contained upon the respondents' labels speaks the truth. J. Backes had been chemist for A. Golsh; and having been such, he had a perfect right to state that fact upon his labels. The factory is not in the same street, nor is its street number the same as that of the appellant's, so that there is no similarity in that respect.

Seventh. The respondents have never sold their matches, nor have they ever been purchased, *as and for* Golsh matches, or *as and for* the appellant's matches, but they have always been sold and purchased as matches manufactured by Menck & Backes. The public has not therefore been in any manner deceived, nor has the appellant been deprived of any gains or profits beyond what might be expected from an honest and successful competition in the business.

Eighth. For these reasons it is submitted by the respondents that the order appealed from should be affirmed.

GARDINER, Judge. If the statements of the bill are analyzed, it will be found that the complainant claims the exclusive right to impose upon the public matches made by himself as those manufactured by A. Golsh.

He alleges that "the label heretofore spoken of, which was used by said Golsh, had an imprint of a bee-hive, and the words of 'A. Golsh, friction matches, 124 Twelfth-street, between 5th and 6th Avenues, New-York,' which label has been and now is used by your orator without variation." In every essential particular, as it respected the complainant, the statement of the label was false. The matches were not Golsh's matches, in the sense in which it was intended that purchasers should understand these terms. He was in Europe, and had no inter-

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est or agency in their manufacture. Verbal declarations to a purchaser, of the same kind, with a view to a sale of this article, it was conceded would have been fraudulent. That they were made to assume a more permanent form, and one better calculated to impose upon those who relied upon the reputation, personal skill, and integrity of Golsh, can make no difference in the character of the transaction. It is no sufficient answer to this view of the subject that the complainant obtained from Golsh the secret of the manner in which his matches were prepared, or that he manufactured an article in all respects equal to that offered by the former proprietor. So also did the defendants, if we may trust their answer. Nor does it alter the case that the complainant purchased the right to use the name of Golsh.

The privilege of deceiving the public, even for their own benefit, is not a legitimate subject of commerce; and at all events, if the maxim that he who asks equity must come with pure hands, is not altogether obsolete, the complainant has no right to invoke the extraordinary jurisdiction of a court of chancery in favor of such a monopoly. The bill is, therefore, defective for want of equity, and for this reason as well as for those assigned by the vice-chancellor and chancellor, I think the order of the latter should be affirmed.

WRIGHT, Judge. A person having adopted and used a particular label, or trade-mark, to indicate to those who deal with him that an article is manufactured or sold by him, or by his authority, others, without his assent, have no right, with the view of deriving advantage from the same, to use such label or trade-mark, without change, or even with such colorable difference as is calculated to deceive the proprietor's customers, or the patrons of his trade or business. Such label or trade-mark, when it has become known, is a species of property; and the owner will be protected against the attempts of others to appropriate to themselves, by its use, the benefit which such owner is entitled exclusively to enjoy. But there can be no harm done to the owner, of which he has the right to complain, unless his label or trade-mark be appropriated without change, or unless it is simulated in such a manner as probably to mis-

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lead his customers, or the patrons of his trade or business, inducing them to suppose that in purchasing the article marked they are purchasing that manufactured or sold by such owner. In this case the appellant alleges that the respondents have been offering matches for sale with a label made in imitation of that used by him. This is denied in the answer of the respondents; but the answer admits that the labels annexed to the appellant's bill of complaint are of the kind used by the respondents. Specimens of labels, as used both by the appellant and respondents, are annexed to such bill. The question of similarity, therefore, can only be determined by inspection.

Upon inspection, I am unwilling to conclude that the label used by the respondents bears such a resemblance to that used by the appellant as to deceive the customers of the latter, or ordinary purchasers, or that a purchaser may not readily discriminate between them by ordinary attention. The only approach to similitude is in the use of the imprint of the bee-hive and of the name of "*A. Golsh*;" but even here there is a distinguishing difference. In all other respects there is no similarity. With ordinary attention no person can be deceived or misled; and consequently the appellant will not be deprived, by the use of the respondents' label, of any gains or profits beyond what might be expected from a fair and successful competition in business.

This case is peculiar in one respect. The label of the appellant is calculated to deceive the purchasers of matches; inducing all unacquainted with the agreement between him and Golsh to believe that they are purchasing an article manufactured and sold by Golsh himself, when in truth Golsh has no concern in the manufacture, or interest in the business, and has left the country.

It is unnecessary at this time to inquire whether, under such circumstances, a court of equity would be bound to protect the appellant, as the dissimilarity in the labels is a sufficient ground on which to determine the case in favor of the respondents.

The decree of the chancellor should be affirmed.

DECISION—*order affirmed, unanimously.*

 Stagg *agt.* Jackson and wife.

NOTE.—GARDINER, J.—*Held*, that the bill was defective for want of *equity*, because the complainant, by his own showing, claimed the exclusive right to impose upon the public matches made by himself, as those manufactured by A. Golsh.

The privilege of deceiving the public for their own benefit was not a legitimate subject of commerce, and therefore it made no difference that the complainant had *purchased* the right to use the name of Golsh. He must come with pure hands when asking for equity.

WRIGHT, J. *Held*, That it was then unnecessary to inquire whether, under the peculiar circumstances of this case, a court of equity would be bound to protect the appellant, as the *dissimilarity in the labels* was a sufficient ground on which to determine the case in favor of the respondents.

Not reported.

STAGG, ex'r, &c., appellant, *agt.* JACKSON & WIFE, respondents.

Questions discussed.

1. Whether a *surrogate* has jurisdiction, under the statute, (2 R. S. 110, § 57,) to call an executor to an *account* for the *rents, issues, and profits* of the *real estate*, where the same was sold not in pursuance of an order, but by directions in the will which devised the real estate to him upon trust, to sell whenever he should see fit?

2. Whether such accounting by the executor should be as *executor* under the statute, or as *trustee in equity*?

3. Whether by the *devise* of the real estate to the executor, and by the whole provisions of the will, the real and personal property was blended in one common fund, which amounted to a *conversion* of the real estate into *personalty at the death of the testator*, upon the doctrine of *equitable conversion*?

Abraham Stagg, by his last will and testament, did devise and bequeath as follows:—

Item. I give, devise, and bequeath all my estate, real and personal, to my executors hereafter named, their heirs, executors, administrators, and assigns, as joint tenants, and not as tenants in common forever, upon the trusts and for the purposes hereinafter mentioned and declared, that is to say, in trust whenever they shall see fit to sell all or any part of the said trust estate to such person or persons, and upon such terms,

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for cash or on credit, or both; as to them shall seem most prudent, and to execute good and sufficient conveyances therefor to the purchaser or purchasers in fee, or for any less estate: and I hereby declare that any such purchaser or purchasers shall not be bound to see to the application of the purchase money, but that the receipt of the said trustees for the purchase money shall be a sufficient discharge for the same.

Item. I also authorize the said trustees, from time to time, to lease and demise any part or parts of the said trust estate for a life or lives, or for years, for such rents, and on such conditions as they shall see fit.

Item. I also authorize the said trustees to invest all moneys to arise from the sale of any part of the said trust estate, or from the rents and profits thereof, and also all the real and personal estate bequeathed to them as aforesaid, and the interest and dividend thereof, in bonds secured by mortgages on real estate, or in the stock of the United States, or of any one of the said states, or of the corporation of the city of New-York, or of the bank of the United States, or of any incorporated bank in the state of New-York, and to change such investment as often as they shall see fit.

Item. I have already advanced for my daughter Anna Matilda, wife of Justus Earle, the sum of one hundred and twenty dollars, and for my daughter Hannah Augusta, wife of Samuel T. Gautier, the sum of one hundred and twenty dollars; and I direct that in distribution of the said trust estate, those sums shall be considered as parts thereof, and charged against the shares of my last named two daughters respectively.

Item. I direct the said trustees to pay out of the said trust estate the sum of fifty dollars yearly, toward the education and maintenance of my daughter Helena, until she attains the age of fifteen years over and above her share of the said trust estate, and the income thereof; and also to pay the like sum of fifty dollars, yearly, toward the education and maintenance of my son Junius Theodore, until he attains the age of fifteen years, over and above his share of the said trust estate and the income thereof.

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Item. Subject to the above directions, I order the said trustees to divide the said trust estate, and the proceeds and income thereof, into nine equal parts, and to pay over and convey one part to my said daughter Anna Matilda and her heirs; one other part to my daughter Mary Elizabeth and her heirs; one other part to my son John Town and his heirs: and I direct the said trustees to hold one other part as the share of my daughter Hannah Augusta, upon the trusts hereinafter mentioned relating to the same; and I further direct the said trustees to hold one of the said parts for each of my five minor children, Abraham, Benjamin, Charles, Frederick, Helena, and Junius Theodore, respectively, on the trusts hereinafter mentioned concerning the same.

Item. As to the shares of my five younger children, I direct the said trustees to hold each of the said shares respectively, until the child for whom it is held shall arrive at lawful age, and then to pay over and convey the same to such child, his or her heirs and assigns; and during the minority of such child, to pay so much of the income of said share for the maintenance and education of such child as they shall think fit and proper; and in case either of my said younger children shall die after me, under age, and without leaving lawful issue, him or her surviving, then the share of him or her so dying shall go to, and be divided among, and considered as part of the shares of my surviving children, and the child or children of such of my children as shall then be dead; the child or children of a deceased child of mine taking the part which his or her, or their parent, if living, would be entitled to.

Item. I authorize the said trustees to make partition of my lands or estate, wherein I shall be at the time of my decease interested as tenant in common, and also to compound and compromise any claims, debts, or sums of money which may be due on my estate, and to accept in satisfaction thereof such partial payments, property, security, or assurances for payments as they shall think discreet; and also to submit to arbitration or umpirage any dispute or difference which may arise between them and others, concerning any demand made by or

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against them as executors, or as trustees or devisees as aforesaid.

Item. Samuel T. Gautier, by a certain deed of assignment, bearing date the twenty-eighth day of July, in the year one thousand eight hundred and twenty-eight, and recorded in the office of the register in and for the city and county of New-York, in lib. 239 of conveyances, page 336, did convey to me, and my heirs and assigns, an undivided third part of certain lands and premises, subject to the life estate of Elizabeth Gautier therein, and also subject to the payment of certain quit rent, and upon certain trusts in the said deed mentioned: and the said Samuel T. Gautier, by a certain other instrument, bearing date on the ninth day of March, in the year one thousand eight hundred and twenty-nine, did authorize me to reimburse myself certain moneys out of the surplus proceeds of the said premises, as by the said deed of assignment and other instrument may appear. Now I do hereby devise to my executors, and to their heirs and assigns, as joint tenants, and not as tenants in common, all my estate and interest in the said lands and premises, legal as well as equitable.

Item. I nominate and appoint my brother Benjamin Stagg, and my son John Town Stagg, executors and trustees of this will.

Item. If only one of my executors should survive me, or if only one of them should prove this will and take on himself the execution thereof, then, and in either of these cases, I give and devise to the executor who shall take on himself the execution of this will, and to his heirs and assigns, the same estate, real and personal, which I have above devised to my executors, and with the powers and on the same trusts.

John T. Stagg, in June, 1835, took upon himself the burden of the execution of the will. James Jackson and Mary E. his wife—the latter being the daughter, devisee, legatee, and one of the heirs at law of the testator—filed their petition before David B. Ogden, Esq., surrogate of the city and county of New-York, praying that the said John T. Stagg might be compelled to account with and pay over to the different parties in interest the shares due to each from the said estate.

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On the 27th of July, 1843, the surrogate made an order that the executor render his account on or before the 20th of August next, (1843,) and that the hearing thereon be adjourned to the first Tuesday of September, 1843.

The executor rendered and filed his account, under oath, of the *personal estate* only, showing a balance in his hands of \$2,835.75. The respondents, Jackson and wife, excepted to the account, and charged that no vouchers were produced for the debits and credits in the account, so that the correctness thereof could be admitted or objected to; and that the following items were objected to as improper, (naming some twelve different items amounting to about \$250.) That no interest was allowed in said account to the estate. That the testator, at the time of his death, was seized of the moiety of the stores Nos. 185 and 187 Washington-street, in the city of New-York; and that the rents accruing from the same were not credited in the said account: that the interest of said testator in said stores was, after his death, sold as directed by the last will and testament of the testator, and that the proceeds of the sale were not accounted for in said account rendered.

That the other real estate, of which the testator died seized, had been sold as directed by said will, but that the proceeds had not been accounted for by said executor.

The answer of John T. Stagg, the executor, averred that the account he had rendered was just and true, and that he was ready to verify the same, and to substantiate by proofs and vouchers the items in said account, according to law.

And further, that no interest was due to said Jackson and wife from the executor, because he had already paid them, before the citation issued, an amount far exceeding the share or proportion due to the wife, Mary E. Jackson, from the personal estate of the testator.

And denied the right, at law, claimed by the respondents, to have or demand any amount of the rents, issues, and profits, or the avails of the real estate sold, whereof the testator died seized, and demurred to such claims and demands, as in said account of said James Jackson and Mary E., his wife, required,

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because, he said, they were not within the jurisdiction of the surrogate's court, nor could the settlement thereof be legally adjudicated before said surrogate.

To this answer and demurrer the respondents filed a replication and joinder.

The surrogate, after argument of the cause on the 24th Nov., 1843, overruled the demurrer of John T. Stagg, the executor, and ordered that he proceed with the further accounting, and that he produce the vouchers for the debts and credits in his account before rendered, exhibiting the particulars thereof; and that he account for the rents and profits of the real estate of which the testator died seized, as well as for the proceeds realized from the sale of the said real estate, after the decease of the testator, and that he file said account, duly verified, with the vouchers, in the surrogate's office on or before 15th Dec., 1843; and that the executor submit himself to an examination on oath touching any property or effects of the deceased which had come to his hands, and the disposition thereof, or in default of compliance with the order, an attachment issue against said executor. The question of the liability of the executor to allow interest on the property and effects which had come to his hands was reserved until further accounting was had.

John T. Stagg, the executor, appealed from the whole of this decree, except that part relating to the personal estate, which would and ought to be included in the inventory of the personal estate of the testator by his acting executor to the chancellor.

On the 23d of February, 1847, the chancellor affirmed the decree of the surrogate, appealed from, with costs to be paid by the executor; and decreed that the respondents, by reason of said appeal, as and for damages for the delay and vexation thereof, recover against the appellant interest on the balance which was due them from the appellant as executor on the 23d Dec., 1843, including in such balance such interest as the respondents were then entitled to upon their share of the funds in the hands of the appellant, from the time when he ought to have paid it over to them, or invested it for their use; and that

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for the purpose of ascertaining and giving to the respondents such damages, the surrogate of the city of New-York, to whom the proceedings were to be remitted, was directed to state the account of said appellant, with a rest on the said 23d day of December, 1843, and to charge the appellant, executor as aforesaid, with interest from that time upon the balance which was then due from him to the respondents for the principal and interest, with which the appellant was then chargeable for the share of the proceeds of the real estate of the decedent, Abraham Stagg, and of the rents, interest, and income thereof.

From the decree of the chancellor, John T. Stagg, the executor, brought an appeal to this court.

Silvanus Miller, Attorney, and
Henry E. Davies, Counsel, for appellant.

First. The surrogate's court, by its original constitution, have no concern with, nor jurisdiction over, real estate.

Second. Whatever jurisdiction over real property it at present possesses is derived exclusively from statutory enactments, which, being in derogation of the common law courts, must be strictly construed. (*Dakin v. Hudson*, 6 Cowen, 221; *Bloom v. Burdick*, 1 Hill, 139; 4 T. R. 107.)

Third. If the surrogate's court has any jurisdiction over the subject matter of this suit, it is derived from the following clause of the revised statutes, viz. :—

“When by any last will, a sale of real estate shall be ordered to be made, either for the payment of debts or legacies, the surrogate, in whose office such will was proved, shall have power to cite the executors in such will named, to account for the proceeds of the sales, and to compel distribution thereof; and to make all necessary orders and decrees thereon, with the like power of enforcing them, as if the said proceeds had been originally personal property of the deceased in the hands of an administrator.” (2 *Rev. Statutes*, p. 110, § 57.)

~~Be~~ Will don't *order* estate sold—only gives power. This is a *devise*, not a *legacy*. *Godolphin*, part 3, ch. 1, § 1; *Wil-*

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hams's Executors, 771.—Trustee has discretion—executor has not. 🖱️

Fourth. The will of Abraham Stagg devises—

1. The real estate to his executors upon trust, to sell all or any part of the trust estate, whenever they shall see fit—thus leaving the selling of the real estate entirely at the option of the executors.

2. It authorizes the trustees to lease and demise any part of the trust estate, for life, or lives, or for years.

3. Then after two small annuities, the will directs the division of the trust estate into nine parts; and the payment or conveyance of one part to testator's daughter, Anna Matilda; one other part to a daughter, Mary Elizabeth; one other part to a son, John; and the holding of another part in trust for a daughter, Hannah Augusta, upon certain trusts; and the five remaining shares to be held for the five minor children of testator respectively, subject to contingencies, and going over to other persons, on the happening of certain events.

Fifth. It must be observed that, under this will, there are two devises of the real estate, viz. :—

1. It is optional with the executors whether to sell or not; and if they do not sell, or until they do sell, the *rents and profits* are to be received and passed over to certain persons. This is a clear *devise*, and not a legacy.

It is not an "incident" to the direction, because it is not connected with the direction, nor necessary for its execution; but is entirely independent of it, neither advancing, nor retarding, nor aiding, nor in any way qualifying the sale.

It is entirely optional with the executors whether they will sell or not. They may never sell. This provision, so far from being an incident to the direction to sell, is made as a substitute, in case the direction is never followed, or during such indefinite time as it shall remain unexecuted.

The appellant demurs specially on the ground that the surrogate has no jurisdiction to call him to account for the rents, issues, and profits of the real estate. (*Vide demurrer case*, p. 17.) And the surrogate by his decree orders him to account for those

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rents and profits, (*case*, p. 7,) and such order is confirmed by the chancellor's decree, (*case*, p. 28.)

If this is a devise, then the surrogate has no jurisdiction, and the two decrees are clearly erroneous.

2. As to the proceeds of the sale, the executor was not liable to account before the surrogate.

(1.) In this case the lands are not ordered to be sold, as is the case in which the statute gives the surrogate jurisdiction.

The will creates a trust, leaving it to the trustee to sell or not as he shall deem best. He is liable to be called to account in equity as a trustee, but the land is certainly not *ordered to be* sold.

(2.) The executor may, if he chooses, divide the real estate, giving to each of the final devisees a ninth part, and accounting to each for a ninth part of the rents and profits, certain parts being contingent, and to be retained by said executors till the contingency occurs; or he may, if he chooses, sell the estate, and make a similar division and appropriation of the proceeds: all this shows a case of trustee and *cestui que trust*, and a case in which the executor will be held accountable in equity. But it is submitted that it does not show a case coming within the 57th section of the revised statutes, quoted above.

Sixth. The chancellor's decree ordering compound interest to be paid, by directing a rest to be made on the 23d December, 1843, ought to be reversed, as the appeal was for reasonable cause, and the case is not one in which damages should be awarded for delay and vexation.

☞ Act of 1837 confers no authority to *compel* the bringing the money into court. ☞

Woodruff & Goodman, Attorneys, and
L. B. Woodruff, Counsel, for respondents.

First. By the provisions of his will the entire property of the testator, real and personal, was blended in one common fund—real estate to be converted into money, and the whole, together with the income thereof, to be applied to the payment of debts and legacies, and be divided among his children.

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1. This amounted to a conversion of the real estate into personalty *at the death of the testator*, upon the doctrine of equitable conversion.

2. This would be true, even if there had been no devise of the legal estate, but only a power to sell, &c., to pay debts and legacies, &c. (*Ram on Assets*, p. 139, [205,] and cases cited; 2 *Pow. on Dev.* p. 60, and onward; *Leigh & Dalzell on Eq. Conversion*, 5 *Law Library*, 1st series; *Marsh v. Wheeler*, 2 *Edw. Ch. R.* 157; *Lorillard v. Coster*, 5 *Paige*, 218; *Bunce v. Vandergrift*, 8 *Paige*, 37.)

Second. In accordance with the above principles, which apply in equity to the whole estate *before* it is actually converted into money, the rents and profits, *when collected*, and the *proceeds* of sales actually made, are legal assets in the hands of the executor.

1. The powers conferred by the will appertain to John T. Stagg, in his representative character, *i. e.* as executor.

2. And upon the principle that whatever goes to the executor *as executor* is legal assets, both the income before a sale and the proceeds after sale are deemed legal assets in his hands. (1 *Cruise*, 61; 1 *Atk.* 484; 1 *P. Wms.* 430; *Hard.* 405, 133; 1 *Vern.* 63; 2 *Vern.* 106, 248, 405; *Prec. Ch.* 127, 136; *Stagg, exr., v. Celle et al V. Chan. of 1st Circuit*, Jan. 23, 1843; *Deg v. Deg*, 2 *P. Wm.* 415; *Dethicke v. Caravan*, 1 *Lev.* 224.)

☞ Some of the late English cases have called these cases into doubt, for the purpose of upholding the exclusive jurisdiction of the court of chancery. ☞

Third. The interest of the respondents (in right of Mrs. Jackson, the daughter of the testator) is that of legatee, entitled to an immediate division of the estate. And the trusts created for the protection of the minor children and grandchildren of the testator do not impair the respondents' right to treat the moneys received by the executor as legal assets, received for their use.

Fourth. Real estate, when *converted* into money for the payment of debts and legacies and distribution, is not only legal

and personal assets in the hands of the executor, but is to be accounted for before the surrogate.

1. The statute is explicit in regard to proceeds of sales.

2. There is no foundation for any distinction between the rents *collected* before the sale and the money received on the sale; both are the result of the conversion contemplated by the will.

3. The accounting must therefore be *as executor*. (2 *Rev. Stat.* p. 24, [82,] § 6; *do.* p. 47, [109, 110,] §§ 55, 57, 61; *do.* p. 32, [92,] §§ 52, 53; *do.* p. 30, [90,] §§ 45, 48; *do.* p. 52, [116,] §§ 18, 19; *Bogert v. Hertell*, 4 *Hill*, 492; *Toller on Exrs.* p. 413, and onward; *Sess. Laws*, 1837, ch. 460, p. 537.)

Fifth. The order appealed from is not erroneous.

1. The appeal should be dismissed, with costs to be paid by the executor *personally*, and not of the estate.

2. Damages should be awarded to the respondents for the delay and vexation caused by the appeal from the court of chancery.

There is nothing meritorious in the objections by the executor to the order appealed from. The nature of these objections—the previous decision of the court of chancery upon the appellant's own application in regard to this estate, acquiesced in by him, and the lapse of *twelve* years, during which the executor has held this estate in his own hands—all show that this appeal is taken for the mere purpose of vexation and delay, while the executor retains the money for his private use and benefit. (2 *Rev. Stat.* p. 513, [618,] § 36, [§ 35;] *Boyd v. Brisbane*, 11 *Wend.* 529.)

DECISION.—*Decree affirmed, with costs, to be paid by appellant.* BRONSON, JONES and WRIGHT, JJ., *were for costs to be paid out of the fund.*

NOTE.—JEWETT, Ch. J., delivered the opinion of the court. *Held*, that independent of the statute (2 *R. S.* 110, § 57) and the provisions of § 75 of the statute of 1837, ch. 460, the surrogate's court had the jurisdiction claimed by it.

That by the provisions of the will it was manifest that the testator intended that his whole estate, real and personal, together with the rents, profits, and income, intermediate the sale should become united in one common money fund

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for the sole purpose of division and distribution among the objects of his bounty; and upon the principle of equitable conversion, the real estate was converted, by the devise and discretion to sell into personalty, from the death of the testator; the money arising from the sale thereof became legal assets in the hands of the executor, when received by him, and for which, as executor, he was bound to account as personal estate.

Reported 1 Comstock, 206.

SPEAR and RIPLEY, appellants, *agt.* WARDELLS, respondents.

Questions discussed.

1. Whether the assignment which a debtor executes under the non-imprisonment law, (*Stat.* 1831, *p.* 400, §§ 16, 17,) is for the benefit of all his creditors, or whether the assigned property goes exclusively to the creditor who institutes the proceedings?

2. Whether a creditor, by commencing proceedings under the non-imprisonment act of 1831, (although he acquires no lien upon the property of the debtor,) acquires a *preference* over other creditors, which cannot be defeated by a *voluntary assignment* made for the benefit of creditors generally?

3. Whether a transfer of a debtor's property to a voluntary assignee, during the pendency of proceedings against him by a creditor under the non-imprisonment law of 1831, is a fraud upon the law and the creditor instituting such proceedings, which a court of equity will not permit?

C. Flint Spear and Geo. B. Ripley, the appellants, merchants in the city of New-York, doing business under the firm of Spear & Ripley, on the 2d Nov., 1846, recovered a judgment in assumpsit for a partnership debt, in the supreme court, for \$1,376.97 damages and costs, against Charles Wardell and Charles E. Wardell, two of the respondents. Spear & Ripley, on the 5th Nov., 1846, made a request and demand of the respondents, C. and C. E. Wardell, that they apply some bills, notes, and accounts, as were of value, which they had and owned, to the payment of appellants' judgment, which said respondents refused to do. And on said 5th Nov. the appellants applied to Hon. JOHN W. EDMONDS, circuit judge of the supreme court, for a

warrant to arrest the respondents, under the fifth section of the "Act to abolish imprisonment for debt, and to punish fraudulent debtors," passed April 26, 1831; and upon adducing satisfactory evidence to said judge by affidavit, that there was a debt due to the appellants from said respondents amounting to more than fifty dollars, and specifying the nature and amount thereof, for which said respondents could not be arrested or imprisoned according to the provisions of the first and second sections of said act, and that the respondents had rights in action and evidences of debt which they unjustly refused to apply to the payment of said judgment; the said circuit judge thereupon issued his warrant as provided in the fifth section of the said act, by virtue of which the respondents were brought before said judge on said 5th Nov., 1846, and on their appearance controverted the facts and circumstances upon which the warrant issued. The hearing was adjourned from time to time, and proofs were offered by the respective parties, and such proceedings had that on the 20th Nov., 1846, the judge decided that the allegations of the appellants were substantiated, and that a commitment issue, as provided by the ninth section of said act, to commit said respondents to the jail of the city and county of New-York.

An adjournment was had, by consent of parties, to the 15th Dec., 1846, and in the mean time the respondents, upon affidavits, applied to the special term of the supreme court for a writ of certiorari, for the purpose of reviewing the proceedings before the judge: this application was denied. The respondents, C. and C. E. Wardell, thereupon severally made and delivered to the circuit judge, under the third subdivision of the tenth section of said act, an inventory of their respective estates, and an account of their creditors, upon which such proceedings were had under that section of said act that, on the 22d Dec., 1846, the circuit judge granted to the respondents the discharge provided for in the 17th section of said act.

On the 21st day of November, 1846, pending the proceedings before the circuit judge, and before his decision ordering a commitment, the said respondents, C. and C. E. Wardell,

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executed an assignment to Henry B. Wardell, (one of the respondents,) a son of said Charles Wardell, of all their co-partnership property and effects, in trust to pay all their copartnership debts and liabilities, *pro rata*; and that said Charles Wardell also on the same day assigned to the said Henry B. Wardell all his individual property and effects, in trust, to pay all his individual debts and liabilities, *pro rata*, and then to apply the surplus, if any there should be, to pay all his other debts and liabilities *pro rata*.

Stephen P. Nash, Esq., was appointed by the circuit judge the sole assignee under the 17th section of said act, (1831;) no property was delivered to said assignee, as being specified in the respective inventories of the respondents, except \$30 in money; all the other property specified in such inventories being saved from the effect of such assignment by the order for the assignment made by the circuit judge, as being property exempt by law from execution.

Upon these facts, substantially stated, Spear and Wardell filed their bill against all the respondents in the court of chancery, and charged that at the time of the issuing of the warrant under said act, and of the arrest of said C. and C. E. Wardell, they owned and were possessed of a large amount of property, of the value of between twenty-eight and thirty thousand dollars, consisting of things in action and evidences of debt, bills, notes, and accounts belonging to the firm, and of real estate situated out of this state, belonging to Charles Wardell individually, of the value of less than \$10,000. That the whole of such bills, notes, accounts, and evidences of debt, belonging to said firm, were delivered to Henry B. Wardell, the voluntary assignee, under the assignment of Nov. 21, 1846; and that said real estate of said Charles Wardell was also conveyed by his individual assignment of that date to said Henry B. Wardell.

The bill further charged that the debts and liabilities of the firm of the respondents, C. and C. E. Wardell, amounted, at the time of their arrest, to about \$200,000, and that they and each of them were utterly insolvent. That said firm, or either

of them, had no real estate in this state upon which appellants' judgment was or could in any way be made a lien. That said judgment remained unpaid, and was in full force and effect, not reversed or satisfied.

The bill alleged that under the proceedings had before the circuit judge, the appellants acquired, under and by virtue of the provisions of said act, a lien, from the time of the arrest of said C. and C. E. Wardell, upon such rights in action and evidences of debt, or so many thereof as would be sufficient to pay in full the sum due to appellants upon said judgment; or a right attaching at the time of said arrest to a priority of payment of said judgment out of such rights in action and evidences of debt; or a right to have such rights of action and evidences of debt, at the time of such arrest, inventoried and assigned to an assignee appointed under said act, to be by him or them administered according to law; which lien or right could not be discharged, except by the payment, or by security for the payment of said judgment, as provided in the first and second subdivisions of the tenth section of the said act; and therefore charged, that the assignments to said Henry B. Wardell, so far as they might have included any rights in action and evidences of debt, were a fraud upon said act, and upon the rights of appellants acquired thereunder.

If such assignments were not fraudulent in this respect, the said Henry B. Wardell, nevertheless, took the rights in action and evidences of debt which the respondents had at the time of such arrest, under the decision of the circuit judge, charged with the payment in full of the judgment of appellants, in preference to any claim or claims of any other creditor or creditors.

The bill alleged that the appellants had, by their attorneys, applied to said Henry B. Wardell to pay their said judgment out of the rights in action and evidences of debt so assigned to him, or to admit the same as a claim to be paid in full out of said rights of action and evidences of debt, (there being an amount more than sufficient for such payment,) in preference to other claims provided for by the assignment, which said Henry B. Wardell refused to do.

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The bill prayed that the said assignments to said Henry B. Wardell might be declared void, and set aside as a fraud upon the said act, and the rights of the appellants acquired thereunder, or other right of appellants acquired by said proceedings of appellants, or that said Henry B. Wardell might be compelled to pay said judgment if the assignment to him was allowed to stand, or deliver over the property so assigned to him to said Stephen P. Nash, the assignee appointed under said act, to be disposed of under said act. Also that a receiver be appointed, and injunction issued, &c.

Charles Wardell, Charles E. Wardell, and Henry B. Wardell, the respondents, put in their joint and several answer. Admitted, that Charles and Charles E. Wardell were partners, and the appellants' judgment, as stated in the bill, That on the said 5th day of Nov., 1846, said firm then owned, as such partners, rights in action and evidences of debt, consisting of promissory notes, bills, and accounts, amounting in value to more than sufficient to pay said judgment of appellants; and that on the day aforesaid, appellants requested both members of said firm to apply some of such bills, notes, and accounts to the payment of said judgment: that in reply to such request respondents stated truly, that a committee of the creditors of said Charles and Charles E. Wardell had been examining their business affairs, and had estimated that their assets, including the real estate and household furniture owned by Charles Wardell individually, would produce about \$28,000; and that their just debts and liabilities amounted to about \$200,000; and had united in a report, recommending to the creditors of the firm to compromise and settle said debts and liabilities; that they intended to call a meeting of their creditors on Saturday of that week, or on Monday of the week next thereafter, and inform said creditors fully of the state of the affairs; and if the said creditors should not all agree to act upon the recommendation of said committee, they should assign all their property to pay all their creditors alike: that they were unwilling to give to said appellants a preference over other creditors, and would not give any of their other creditors a preference over the appellants.

The answer denied that respondents, other than as before stated, refused to apply some of such notes, bills, and accounts as were of some value to the payment of appellants' judgment. Also admitted the issuing of the warrant and the proceedings had before the circuit judge, as mentioned in the bill. And that said respondents, after the decision of the supreme court denying their application for a certiorari, appeared before said judge, and in order to prevent, as provided in the tenth section of said act, the granting of a commitment, severally made and delivered to the officer, under the third subdivision of the said tenth section, an inventory under oath of their respective estates, and an account of their creditors; and severally prayed that their property and estate, respectively, might be assigned as required by the provisions of said act; and that said officer would also grant to them respectively a discharge, according to the provisions of said act; that said appellants opposed the granting of said discharge, on their allegation, which was admitted by respondents respectively to be true, that they had, after their said arrest, and before the said decision of said officer, made by him on the 28th Nov., 1846, executed the assignments in said bill mentioned to Henry B. Wardell; and also on the ground that said respondents having made such assignments pending said proceedings, their proceedings were not just and fair, and were a fraud upon said act, and upon the rights alleged by appellants to have been acquired by them by their proceedings, under said act. That on the 21st day of December, 1846, the officer decided that appellants had failed to satisfy him that the proceedings on the part of the respondents, C. and C. E. Wardell, were not just and fair, and had also failed to satisfy him that said respondents had concealed, removed, or disposed of any property with intent to defraud their creditors; and did thereupon order that the property of said respondents, except such as was by law exempt from execution, should be by them respectively assigned to Stephen P. Nash, Esq., counsellor at law, New-York. That in compliance with such order, respondents, on said 21st Dec., 1846, severally executed such assignment; and that on the said 21st Dec., 1846, the said officer

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granted to the said Charles Wardell and Charles E. Wardell, severally, the discharge provided for in the seventeenth section of said act.

The answer proceeded to controvert the several allegations in the bill, that the appellants had acquired a lien upon, or right to a priority of payment out of the said property of the respondents; and that the assignment to Henry B. Wardell was a fraud upon the said act and upon appellants' rights acquired under the aforesaid proceedings, &c.

The cause having been argued upon the bill and answers therein, the CHANCELLOR, on the 4th of August, 1847, dismissed the bill with costs.

From this decree Spear and Wardell appeal to this court.

F. W. Walker, Attorney, and



Stephen P. Nash, Counsel for appellants.

First. The creditor who has obtained the commitment of a fraudulent debtor, under the non-imprisonment act, is entitled to a preference over creditors at large, in the distribution of the debtor's property under the act. (*People v. Abel*, 3 Hill, 109; *Berthelon v. Betts*, 4 Hill, 577; *Moak v. De Forest*, 5 Hill, 605; *Practical Directions under Non-Imprisonment Act*, pamph. p. 15.)

1. There are no provisions in the act for the joinder of several creditors, or for the coming in of a subsequent creditor under the proceedings instituted by the first. At the outset the proceeding is an individual one. (*Non-Imp. Act*, *Laws of 1831*, p. 396, §§ 3, 4, 7.)

2. All the causes for granting the warrant are such as *may* apply to individual creditors, and some of them such as would not ordinarily apply to all the creditors. (§ 4, *sub.* 1, 2, 4.)

3. There are no provisions in the act for securing the rights of others than the prosecuting creditor, by notice of any sort. (§ 14; § 10, *sub.* 3; § 21.)

 Notice to the prosecuting creditor—and to none other—persons imprisoned. 

4. All the means of averting commitment, unless it be by assignment of the debtor's property, enure to the benefit of the

prosecuting creditor exclusively. (§§ 10, 24; *Laws of 1845*, p. 238; *Laws of 1846*, p. 255; 1 *R. S.*, 2d ed., p. 789.)

5. There is nothing in the act showing that the discharge by petition and assignment is an exception to the general tenor of the act.


(a) The petition, account and inventories are assimilated to similar proceedings under art. vi, tit. 1, chap. 5, of Part I of the revised statutes, which are for the benefit of the creditor or creditors at whose suit the debtor is charged in execution.

(b) The reference to art. v, for the effect of the assignment, is only for the purpose of ascertaining what property the assignment passes, and the period from which it relates. It does not determine who are to be the distributees.

(c) The requirement of the 18th section of the act, that the assignees "shall make dividends," can be satisfied without a general distribution, as well as without an equality of distribution. The term "dividend" does not exclude priorities in distribution, nor a limited distribution. See 1 *R. S.*, p. 803, § 37, where dividends are provided for, yet certain priorities declared.

Second. If the creditor who has obtained a commitment is entitled to a preference of payment out of the debtor's property, any voluntary disposition of that property by the debtor, pending the proceedings and in order to defeat such preference, is a fraud upon the statute, and a court of equity has jurisdiction to protect the creditor's right and set aside the fraudulent act. (*Matter of Hurst*, 7 *Wend.* 239; *Wood v. Bolard*, 8 *Paige*, 556; *Hadden v. Spader*, 20 *John.* 554; *M'Dermutt v. Strong*, 4 *John. Ch. Rep.* 687.)

Third. If this jurisdiction can be exercised at all, it can only be in behalf of the creditor whose priority has been overreached. He is, therefore, the proper party complainant.

 The assignee does not date back of the assignment—he could not overreach the fraudulent assignment—and only takes the property mentioned in the inventory—and here there was none. (5, 16; 1 *R. S.* 788, §§ 8, 9; 781, §§ 2–8; 8 *W.* 339, 348.)

Objection, want of parties—not having been taken in

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answer, or in any other way, if valid, should be allowed to amend. —

Fourth. The discharge does not conclude as to the creditor's right. The discharge is statutory, and has only the effect given it by the statute, which is merely to exonerate the debtor from being further proceeded against *under the act*. (*Non-Imp. Act*, § 17.)

Fifth. The decree of the chancellor should be reversed, and the defendant, Henry B. Wardell, be decreed to pay the complainants' judgment with interest and costs.

J. S. Bosworth, Attorney and Counsel for respondents.

First. The bill does not allege that C. and C. E. Wardell assigned their property with the *actual intent* to defraud their creditors generally or the appellants in particular. And had it so alleged, the appellants were not in a position to file a bill, at the time of filing this, to set aside the assignments, even if they were in fact fraudulent as against them. The bill does not allege that an execution had been sued out on the judgment, and none could have been issued and made returnable at the time it was filed. (1 *Paige*, 305.)

Second. The whole claim of the appellants is based upon the erroneous supposition, that by claiming against C. and C. E. Wardell that they had unjustly refused to apply their choses in action to pay the appellants' judgment in full and convicting them thereof, they acquired a specific lien on or right to the property of these debtors, real as well as personal, individual as well as copartnership, entitling them absolutely to have such property applied to pay their judgment in full to the exclusion of other creditors. (*See Bill*, *fols.* 25 to 31, and 42 to 46.)

It is sought to construct this claim upon the hypothesis that an assignment, made by a debtor after conviction to procure a discharge, enures to the exclusive benefit of the prosecuting creditor; and that after his arrest, and while the proceedings are pending, he cannot make a valid assignment, except to a statutory assignee to avoid a commitment after conviction: this hypothesis is entirely erroneous, because

1. The act nowhere provides that the prosecuting creditor shall acquire such lien on or right to the debtor's property; or that such an assignment shall be for the exclusive benefit of the prosecuting creditor; or that pending the proceedings the debtor can make no valid disposition of his property.

2. The whole scope and tenor of the act are directly hostile to the rights and construction contended for by the appellants. As originally passed, subdivision v, of § 10, (*Session Laws of 1831, p. 398,*) allowed a debtor, convicted of any fraud, to obtain a discharge, on giving to the plaintiff a bond with sureties, "conditioned that he will not remove any property which he then has out of the jurisdiction of the court in which such suit is brought, with the intent to defraud any of his creditors; and that he will not assign or dispose of any such property, with such intent, *or with a view to give a preference to any creditor,* for any debt antecedent to *such assignment or disposition,* until the demand of the plaintiff, with the costs, shall be satisfied, or until the expiration of *three months* after a final judgment shall be rendered in the suit brought for the recovery of such demand."

This provides *against* preference and priority of payment as absolute rights. The debtor, though convicted of fraud, and having given this bond, may sell, exchange, and assign his property if his assignment creates no preferences. A creditor not proceeding under the act, and first obtaining a judgment, may levy on the debtor's property subject to execution, and first procuring an execution returned unsatisfied, may file a creditor's bill and reach the debtor's choses in action, to the exclusion of the creditor proceeding under the act of 1831.

This view of itself answers the claim made, that by initiating a complaint under this act, and subsequently convicting the debtor, the prosecuting creditor acquires a lien on or right to an application of the debtor's property attaching at the time of the issuing of the warrant or of the arrest, to pay his claim in full to the exclusion of other creditors.

3. This 5th subdivision of § 10 was found of no avail in the class of cases where the complaint was, that the debtor had

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already disposed of his property with intent to defraud his creditors. With a design to obviate this difficulty, chap. 418 of Laws of 1837, (*page* 466,) provided that the 5th subdivision of § 10 of the act of 1831 "shall apply only in cases where the particular fraudulent design established against the defendant is only that specified in the first subdivision in the fourth section of the act hereby amended." This act gives no right to the prosecuting creditor, over the general creditors, to the debtor's property, either before or after an assignment to a statutory assignee, not given by the act of 1831—it prescribes to the statutory assignee no new rule of distribution. It creates no new inhibition to the exercise of the debtor's right to dispose of his property at any time for the benefit of all his creditors without preferences.

The whole scope and force of the provisions of the act as thus amended would seem to amount to this and no more: If he is convicted of the fraudulent intent specified in subdivision 1 of § 4, he may be discharged on giving the bond prescribed by subdivision 5 of § 10. Then what lien on or right to the debtor's property has the prosecuting creditor acquired? None at all. He has security that the debtor shall not remove it from the jurisdiction of the court or assign it with a view to prefer debts antecedent to assigning it. The force of all proceedings had or which can be had under the act to reach the property is then spent. If reached at all, it must be by execution, or creditor's bill. If so reached, it is by proceedings independent of the act. And other creditors may come first with an execution and creditor's bill, and take the whole property. The debtor may honestly sell it for its fair value in money. The prosecuting creditor, if he gets any thing, must reach this money. The arrest does not operate as an injunction to suspend the debtor's general power to dispose of it, nor does it impair his title to it, or suspend his right to transfer it.

If a debtor is convicted of either of the frauds specified in the 2d, 3d, and 4th subdivisions of § 10, he may still be discharged under the 3d subdivision of the latter section, on executing an assignment of all the property he has at the time of

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executing the same, (§ 16 of *Act of 1831*, 2 R. S. p. 30, § 9, and *id.* p. 21, § 28,) unless the opposing creditor satisfies the officer "that the proceedings on the part of the petitioner (the debtor) *are not just and fair*, or that he has concealed, removed or disposed of any of his property, with *intent* to defraud his creditors." If the officer is satisfied that the proceedings are unjust and unfair, or that the debtor has concealed, removed, or disposed of any of his property with *intent* to defraud his creditors, a discharge will be denied and the debtor committed and kept in custody as a prisoner on criminal process. (§ 11.)

What lien on or right to the debtor's property has the creditor acquired by force of these proceedings, or to what extent has he destroyed his power of alienation? If the debtor chooses to remain in jail, his property cannot be reached under the act of 1831. Any other creditor who has prosecuted his claim to judgment and execution may levy on any thing which can be seized upon by execution; and if he has an execution returned, may file a creditor's bill and acquire a priority of right to all that an execution will not reach. The debtor may still do what equity declares to be just and fair, viz., assign all his property for the benefit of all his creditors without any preferences between them.

By the act of 1840 (*page 320*) the debtor, on being arrested on a warrant, in order to procure an adjournment of the proceedings, must give a bond with sureties, "conditioned that, until the final decision of the matter pending before such officer such defendant will not remove any property which he then has out of the jurisdiction of the court in which the suit in which such warrant was issued is brought, with intent to defraud any of his creditors; and that he will not assign or dispose of any such property with intent or with a view to give a *preference* to any creditor *for any debt antecedent to such assignment or disposition*."

The original act, and the act as amended, leave the debtor free to devote all his property at any time among all his creditors without preferences. Not only that, it seems to be continually inviting him, both by its terms and spirit, to atone

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civilly for any fraudulent intent or act of his, by making such a disposition of it. The creditor acquires no rights making it unjust or unfair toward him, for the debtor to so assign it, or which can impair the debtor's right, or absolve him from the equitable duty existing at the time of his arrest to so assign it. (*Townsend v. Morrell*, 10 *Wend.* 577; *Wood v. Bolard*, 8 *Paige*, 556; *Bank of Rochester v. Emerson*, 10 *id.* 359; *Jackson v. Cornell et al.*, 1 *Sandford*, 348.)

Third. If the position that an assignment to a statutory assignee will enure to the exclusive benefit of the prosecuting creditor is tenable, it will not help the appellants in this case, unless the court go further, and hold that the debtor after his arrest and before conviction has no right as against the prosecuting creditor to assign his property for the equal benefit of all his creditors. If he has that right, then the assignments in question are valid, although the appellants may receive the whole benefit of the assignment subsequently made to the statutory assignee. The question of the right of the debtor to make an assignment of his property pending the proceedings without preferences, is not necessarily dependent upon or connected with the question, who are to participate in the proceeds of the property assigned to a statutory assignee?

Fourth. But the proceeds of property assigned under this act are to be distributed *pro rata* among all the creditors. This is so, because,

1. No part of the act declares that the prosecuting creditor shall alone or be first paid.

2. The assignment under this act (§ 16) is to be in the same manner, and with the like effect, as provided and declared in the 5th article of 2 R. S. p. 28. Such an assignment is for the *pro rata* benefit of all the creditors. (2 R. S. p. 47, § 36, *sub.* 3.)

The object of the 5th article is to exempt the debtor from arrest or imprisonment, "by reason of any debts arising upon contracts made previously," to the execution of an assignment. (2 R. S. p. 28, § 1; *id.* p. 30, § 10.) All the creditors in that case participate equally in the assigned property, whether their demands are due or not due.

The act of 1831 is a substitute for this 5th article. It abolishes imprisonment for debt absolutely, and enables creditors on proof of certain frauds having been committed, or of the intent to commit them, to have the debtor imprisoned, or to coerce from him an assignment of his property, or security, as the case may be, that he will not, within a stated period, assign with intent to defraud creditors, or with a view to prefer antecedent debts.

If the debtor assigns under the act, an order is granted "which exonerates the debtor from being proceeded against under the 3d, 4th, 5th, 6th, 7th, 8th, and 9th sections of the act, by any creditor, entitled to a dividend ('as hereinafter provided') for any fraud committed, or intended before such discharge," whether it be a fraud of which he has been convicted or not, or one of which the prosecuting creditor could complain or not.

The discharge being granted, there is no creditor who can imprison under the act, (if all are entitled to dividends,) and the debtor stands precisely as he would on obtaining a discharge under the 5th article. He is discharged from imprisonment on all contracts, and all creditors share *pro rata* in his estate.

The only question is, What creditors are entitled to a dividend as "hereinafter provided?" Justice BRONSON intimated in the *3d of Hill*, *People v. Noble*, 109, 112, that only those creditors "who have (then) applied or are (then) entitled to apply for a warrant for the arrest of the debtor under the 3d section of the act," are entitled to dividends. This clearly cannot be so; for by the 12th section of the act, "any person against whom *any* suit shall have been commenced in a court of record" on contract, in which the debtor cannot be held to bail, though he has committed no fraud, may present a petition praying that his property may be assigned, and that he may have the benefit of the provisions of this act. He makes the assignment and obtains his discharge. No creditor is entitled to a dividend under this rule, because none has then applied, or can then apply for a warrant for the arrest of the debtor.

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Yet it must be conceded that the assignee, under the act, is to make dividends by some rule, no matter of what fraud the debtor has been convicted, or whether he assigns without having committed or intending to commit any fraud.

By § 14, notice of presenting the petition is to be served on the plaintiffs prosecuting, their personal representative, or attorney. No notice is required to be served on the other creditors, for the reason that the plaintiffs represent *all*, so far as the benefits and effects of assignment are concerned, if one be made. But the plaintiffs are not the only creditors entitled to oppose the application. By § 15, *any creditor* of the petitioner may oppose, and examine the petitioner, his wife, or any other witness, and have subpoenas to compel the attendance of witnesses, though he has not applied, and could not apply for a warrant, which is absurd if he has no interest in the question and is not entitled to dividends.

3. If the rule of distribution intimated by Justice BRONSON, in the *People v. Noble*, be the true one, then what creditors would be entitled to dividends? Suppose the fraud alleged and established be that specified in subdivision 1 of § 4, it is as much a fraud upon one creditor as another. In such a case every creditor may apply for a warrant, for every one is equally defrauded. Then every creditor would be entitled to dividends.

If the fraud alleged and established be that specified in the first clause of subdivision 2, or either of those named in subdivision 3, it is as much a fraud upon each, as either creditor, and each one has the same right to apply for a warrant. By this rule any creditor should receive dividends.

If it be said that none can apply except those whose debts are due, then this rule would exclude only those whose debts were *not due*. This principle of discrimination would be in direct conflict with article 8., (2 R. S. p. 40, § 38.) The latter section gives to creditors, whose debts are not due, the same right to dividends as to those whose debts are due. The only exception to the rule is in proceedings under article 6.

Section 18 of the act of 1831 vests the assignee with the "rights and powers," subjects him "to the same duties, obliga-

tions and control, *in all respects*," as specified in the 8th article, and directs that he "shall make dividends." One general duty is, in all cases, to divide *pro rata* among all creditors, except a single specified case. Shall he make dividends according to the *general rule*, or follow the law of the excepted case, and give all to the prosecuting creditor?

If the conviction be under the last clause of subdivision 2, or under subdivision 4, it is true that *the* charge made by the complaining creditor is one which perhaps no other creditor can then or at any time make. But it would seem to be equally true, that if an assignment be made under the act of 1831, no matter what the fraud charged, the assignee must make dividends by a fixed and inflexible rule. The only question is, Among whom? Obviously, among all. All would take under an assignment under article 5. The act of 1831, in its general scope, is a substitute for that. Both look to securing freedom from imprisonment on all contracts, on complying with their respective provisions.

For almost every specified cause of arrest under the act of 1831, every creditor can apply for a warrant. Those who cannot apply cannot imprison the debtor, and the discharge secures the debtor obtaining it against imprisonment for "any fraud committed or intended before such discharge." (*Sec. 17 of Act of 1831.*) That discharge being granted, there is no creditor who can imprison, and the debtor stands precisely as he would on obtaining a discharge under the 5th article, and his creditors should clearly be left with like rights, viz., to receive *pro rata* dividends.

The debtor obtaining a discharge under article 6, might be imprisoned the next day at the suit of any other creditor. (2 R. S. p. 32, § 11.) That act looks not to a general discharge from imprisonment on all previous contracts, but only to a discharge from the particular executions on which the debtor is then in prison. If the act of 1831 designed only to relieve a debtor to the like extent on his assigning his property, and to give the assigned property to the prosecuting creditor only, why did it not so provide, or at least direct an assignment to

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be made "in the same manner" as provided in article 6, and that it should be "for the benefit of the creditors upon whose complaint he is convicted," as article 6 declares? (2 *R. S.* p. 32, § 9.) Instead of that, the act of 1831 abolishes imprisonment on all debts, and, like article 5, discharges from imprisonment in proceedings to collect debts, for all frauds committed or intended prior to the grant of the discharge, requires it to be made "in the same manner," and declares it "shall be executed with the like effect as declared in the" 5th article, and "shall be recorded in the same manner." (§ 16.) An assignment under article 6 is not to be recorded. (2 *R. S.* p. 38, § 19.) An assignee under the 6th article is not "subject to the same *duties*, obligation and control *in all respects*," as prescribed in the 8th article. (2 *R. S.* p. 38, § 14.) Under the act of 1831 he is. (*Act of 1831*, § 18.) There is no difference in the *duties* of the two, except what arises from the duty in the one case to pay the jail fees and execution creditors, and then pay over the surplus of the assigned property to the debtor, (2 *R. S.* p. 38, § 15;) and from the duty in the other case, to advertise notice of their appointment of a general meeting of creditors for adjusting all accounts and demands for and against the estate of the debtor, and dividing the assigned property. (*Art.* 8, §§ 8, 27, 36, 38, and 47.) No such notices are to be published under article 6. (2 *R. S.* p. 33, § 15.) Under article 6, the debtor is not necessarily required to assign all his property. (*Id.* p. 32, § 6.) Under the act of 1831, he must assign *all*. (*Act of 1831*, § 17.)

4. Justice COWEN, in *Berthelon v. Betts*, (4 *Hill*, 579,) says, the act of 1831 "refers to article 6, of the revised statutes concerning voluntary assignments by imprisoned debtors, following out in the main such details as are there prescribed," and on this assumption he intimates an opinion that the assignment enures to the benefit of the prosecuting creditor. In this he is clearly in error. There are but two respects in which there is any analogy. One relates to the *form* of the papers to accompany the petition, § 13, the other to the *time* of service of notice of presenting it prior to its presentation.

Every other detail, either regulating the proceedings, the assignment, the discharge of the debtor, the duties of the assignee, the effect of the assignment, and of the discharge, and the rights of creditors to dividends, bears no analogy to article 6; but by the express terms of the act the details of other articles are to be followed.

1. "Any creditor of the petitioner" may oppose, examine the petitioner, his wife, and witnesses, as prescribed in the third article, and may require the case to be heard and determined by a jury, § 15, act of 1831. The same proceedings may be had under article 5, §§ 4, 5, and 6. Under article 6, "the court" by whose process he is imprisoned is "to proceed in a summary way to hear and determine the proofs and allegations of the parties."

2. Under article 6, an assignment is to be made by an indorsement on the petition, § 8. Under the act of 1831, an assignment is to be made "in the same manner as under article 5, and to be recorded," § 16, act of 1831. An assignment under article 6 is not to be recorded. (2 *R. S. p.* 38, § 19.)

3. An assignment under article 6 is only to be of so much property "as shall be sufficient to discharge the executions on which he (the debtor) shall be imprisoned," § 6. Under the act of 1831 it must, as under article 5, be of "*all his estate*," § 17.

4. The only effect of an assignment under article 6 is, to vest in the assignee the property assigned, "for the benefit of the creditors upon whose executions he is imprisoned," § 9. Under the act of 1831, the effect is the same as that of an assignment under article 5, which vests in the assignee all the estate of the debtor for the benefit of all his creditors, § 16, act of 1831. (2 *R. S. p.* 47, § 38.)

5. Under article 6, on the assignment being made, the court "orders" the debtor discharged from the executions mentioned in his petition, § 11.

Under the act of 1831, a discharge is granted which exonerates the debtor from being proceeded against by any creditor, who has a claim or demand upon which the debtor cannot be held to bail under the second section of the act of 1831, for

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any fraud committed or intended before such discharge, § 17, act of 1831.

6. Article 6 does not subject an assignee to "all the duties, obligations, and control, *in all respects*," as are prescribed in article 8, § 14. The act of 1833 does, § 18.

7. Article 6 dispenses with the necessity of publishing any notice calling a general meeting of creditors, § 14. The act of 1831 does not, but makes the publishing of such a notice necessary, § 18 of act 1831.

8. Article 6 directs the assignee, after paying the jail fees, to pay the creditors who had charged the debtor in execution previous to the exhibition of his petition, and return the surplus to the debtor, after having done that and defraying their expenses, § 15. The act of 1831 makes article 8 the rule of the assignee's duties, directs him to make "dividends," § 18 act of 1831, and entitles creditors to dividends, although they have neither convicted nor imprisoned the debtor, or made complaint against him, § 17.

9. If the "duty" of an assignee, under the act of 1831, be such as is prescribed by article 8, he would be under "obligation" to pay the debtor five per cent. on the nett produce of all his estate, if sufficient to pay seventy cents on the dollar, until such payment amounted to five hundred dollars.

10. The act of 1831 prescribes the same compensation for the officers and assignees performing any duties under it as are provided by law for "*similar services*" under article 5, § 19, 1831. By express terms the assignee under this act is compensated for doing the *same services* as are to be performed by an assignee under article 5, and at the same rate, which is absurd, unless the two are to proceed, advertise, and make dividends in the same manner.

It is most clear that the grounds on which Justice COWEN intimated his opinion in relation to the class to be benefited by an assignment under this act are entirely erroneous. If it was just for him to conclude that such an assignment must be held to follow the analogies of one under article 6, assuming the details of the proceedings to obtain each to be the same, the

same logic would require the conclusion, that, like one under article 5, it is made for the benefit of all creditors, as the essential details to obtain the two, the declared effect of both, and the prescribed duties of the assignee in each case are, in fact, the same.

Fifth. By the expression, "*which shall exonerate him from being proceeded against by any creditor entitled to a dividend of the estate of such petitioner, as hereinafter provided, under the third, fourth, fifth, sixth, seventh, eighth, and ninth sections of this act,*" in § 17, is meant every creditor who has a demand for which the debtor cannot be held to bail under § 2 of the same act.

By § 2, on a certain *class* of contracts, a debtor can be held to bail as a matter of-course, and so could non-resident debtors on any contracts prior to the act of April 25, 1840. (*Ely v. Lyons*, 18 *Wend.* 644.) On this *class* of contracts no warrant can be issued for the arrest of the debtor, under any of these enumerated sections. The complaining creditor must show the *nature* of his debt or demand, and that it is not of the *class* for which a debtor could be arrested or imprisoned under § 2.

These specified sections embrace all that relate to the arrest, trial, and conviction of a debtor for fraud, at the suit of all creditors, or any creditor not in the class named in § 2. All the subsequent sections relate to proceedings to be had after the debtor's conviction. These enumerated sections, being the third to the ninth inclusive, were designed to designate a *class* who should receive dividends, and to embrace within that class all creditors to whom the right was not reserved by § 2, to arrest and imprison the debtor. Hence it was that § 12 provides that a debtor *sued* by one of this *class*, although he had committed no fraud, nor intended to commit any, might petition to have his property assigned for the benefit of all such creditors, and for a discharge, and obtain one that would place him in the same position as he would have been with a discharge under article 5, prior to the passage of this act. Hence it is that assignments in the two cases are to be made in the same manner, and with the like effect. Hence it is that the duties of the assignees in the two cases are the same, that they

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are to perform similar services, and to be compensated at the same rate. Hence it is that no rights are given to creditors whose debts are due, over those whose debts are not due. Hence it is that the debtor is exonerated from being proceeded against for other frauds than those of which he has been complained of. Hence it is that an act which abolishes imprisonment upon a *class* of contracts, and authorizes the debtor's arrest for a variety of frauds, which from their character must be equally a fraud upon all, provided that all creditors of this *class* shall receive dividends. The enumerated sections mean all creditors who cannot arrest or imprison the debtor under § 2, whether their debt is due or not, and whether they have or have not applied for his arrest.

Sixth. The twenty-sixth section of the act of 1831 authorizes a debtor to be prosecuted criminally and convicted of a misdemeanor for either of the *actual* frauds enumerated in § 4. Section 27 provides that upon his conviction, trustees may be appointed to take charge of his estate in the manner provided by article 2, (2 R. S. p. 15,) and that such trustees shall be subject to the same duties, obligations, and control in all respects as trustees appointed under said second article. "Such trustees shall pay the debts of such imprisoned debtor, in *the same manner* as hereinafter directed in article 8 of this title, and be subject to the same control, obligations, and responsibilities." (*Id.* § 4.)

The *manner* is no otherwise provided in article 8, than by the general provision, that in case of assignments, or the appointment of trustees of a debtor's estate, under all the articles treated of in article 8, except the sixth, all creditors, as the general rule, shall receive dividends, and that too whether their debts are due or not due. Section 4 of article 2 directs "the debts" paid, and § 18, of act of 1831, directs "dividends" made, and both of them refer to article 8, for the rule and manner of distribution, and there is no rule recognized there but that of equality among all creditors.

They are to make dividends annually, (2 R. S. 48, § 43,) so long as any estate of the debtor remains in their hands, and

may be required to account, by the debtor as well as the creditors. (*Id.* § 48.) No one can doubt that under article 2 all creditors are to be paid *pro rata*, and there would seem to be no ground for claiming that all are not to be thus paid, under an assignment made under the act of 1831.

Seventh. The question, whether an assignment under the act of 1831 enures exclusively to the benefit of the prosecuting creditors, and which constitutes the only basis of the relief prayed by the bill, does not arise in this suit. That question can only be raised in a suit between the creditors and the statutory assignee. The proper time to settle that question is, upon calling the assignee to an account under 2 R. S. 48, § 48. The court of chancery has no jurisdiction of the question. The statute, which gives whatever of right there may be, designates the court which shall have control of the matter. That must be the supreme court, or the common pleas of the county in which the assignee resides. (*Id.*) An assignee, under the act of 1831, is subjected to the same "*control in all respects*" as prescribed in article 8. That control was vested, in this case, in the supreme court, or New-York common pleas, at the option of the moving party. (7 *Gill and John*. 170.)

Eighth. Judge EDMONDS expressly adjudicated, that the making of the assignments in question was not unjust and unfair toward the appellants, or a fraud upon any rights they had acquired by their proceedings under the act. (*See answer*, fol. 27-30, and fol. 34-38.) His decision of that question is conclusive and final. (*Birdsall v. Phillips*, 17 *Wend.* 464; *The People v. The Judges of Dutchess*, 23 *Wend.* 360; *Niblo v. Post's Administrators*, 25 *Wend.* 280; *Mercein v. The People*, 25 *Wend.* 64.) If the decision be not conclusive and final, the only way in which it can be questioned is by reviewing it upon certiorari. It cannot be questioned collaterally. (*The People v. Akin*, 4 *Hill*, 606; *Spencer v. Hilton*, 10 *Wend.* 68.)

The court of chancery has no jurisdiction of bills in the nature of an appeal or writ of error, to review the decisions of judicial officers or inferior courts. The discharges granted are a bar to all relief prayed in the bill. (*Answer*, fol. 98.)

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Ninth. If for any reason it could be held that the property passed to the statutory assignee, or that he is of right entitled to be possessed of the same, and to distribute it as such assignee, notwithstanding the assignments of it to H. B. Wardell, then such statutory assignee is the only person, as the representative of all the creditors having any rights resulting from the proceedings under the act, who can file a bill to have the assignments made to H. B. Wardell set aside, and the property delivered and accounted for to him.

DECISION.—Decree of the chancellor reversed, and decree declaring that Henry B. Wardell holds the assigned property as trustee for the complainants to the extent of their debt; and that he pay the same, together with their costs in the court of chancery, out of the fund in his hands.

For affirmance, RUGGLES and JONES, JJ.

For reversal, JEWETT, BRONSON, GARDINER, WRIGHT, JOHNSON, and GRAY, JJ.

NOTE.—WRIGHT, J. *Held*, that these assignments (to Henry B. Wardell) were made in fraud of the act, and of the rights of the appellants, acquired thereunder; and it was plainly to be perceived, were so intended by the respondents themselves. For if, as they then contended, the statutory assignee would take for the benefit of all creditors, why, pending the proceedings, voluntarily make assignments having the like effect? Nothing could be more undoubted than that the respondents contemplated a fraudulent interference with the statutory assignment.

BRONSON, J.—*Held*, that although the appellants acquired no lien upon the property by commencing proceedings under the act, they acquired the right to a preference over the other creditors, which could not be defeated by a voluntary assignment; and the transfer of the property to Henry B. Wardell was a fraud upon the law and the appellants, which a court of equity should not permit to succeed.

Reported 1 Comstock, 144.

Cornes *agt.* Harris.

CORNES, plaintiff in error, *agt.* HARRIS, defendant in error.

Questions discussed.

1. Whether the *declaration* in this case was for the old assize of *nuisance*, or in an action on the *case* for nuisance?

2. Whether an action on the case for nuisance can be commenced by *original writ*? And if not, whether, when so commenced, the defendant, by pleading to the declaration in an action on the case, waives the defective manner in which he was brought into court?

Harris sued Cornes in the supreme court by writ of nuisance in the following form:—

“*The People of the State of New-York* to the Sheriff of the county of Oneida, greeting:—Whereas, Oliver Harris hath complained to us that George Cornes unjustly has raised a certain slaughter-house and divers cattle-pens, sheep-pens, calf-pens, and hog-pens, in the town of Sangerfield, in your county, to the nuisance of the freehold of the said Oliver Harris: We do therefore command you, that you summon the said George Cornes, that he be before our justices of our Supreme Court of judicature, at the academy in the city of Utica, on the 19th day July, instant, to answer the said Oliver Harris in the premises; and have you then there this writ.

“Witness, GREENE C. BRONSON, Esquire, our chief justice, at the academy in the city of Utica, the 7th day of July, 1845.

“BEARDSLEY, *Clerk.*

“A. C. HARRIS, *Attorney.*”

The declaration, including the first count, was as follows:—

“*Oneida County, ss.*—George Cornes was summoned by writ, according to the form of the statute in such case made and provided, to answer Oliver Harris in a plea of nuisance wherefore he hath raised a certain slaughter-house, and divers cattle-pens, sheep-pens, calf-pens, and hog-pens; and there-upon the said Oliver Harris, plaintiff in this suit, by A. C. Har-

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ris, his attorney, *complains* of the said George Cornes, defendant in this suit :—

“ For that whereas the said plaintiff before and at the time of the committing of the grievances hereinafter mentioned, was, and from thence hitherto hath been and still is possessed of a certain dwelling-house and premises, with the appurtenances, situate at Sangerfield, in the county of Oneida ; and in which said dwelling-house, with the appurtenances, he the said plaintiff, together with his family, at the several times hereafter mentioned, did inhabit and dwell, and still doth inhabit and dwell, to wit, at the place in the county aforesaid. And whereas also, the said defendant before and at the time of the committing of the said grievances, was, and from thence hitherto hath been and still is possessed of a certain other dwelling-house and piece of ground, with the appurtenances contiguous and near to the said dwelling-house and premises of the said plaintiff, to wit, at the place aforesaid ; yet the said defendant, well knowing the premises, but contriving and wrongfully intending to injure and aggrieve the said plaintiff, and to incommode and annoy him, together with his said family, in the possession, use, occupation, and enjoyment of his said dwelling-house and premises, with the appurtenances, to wit, on the first day of June, one thousand eight hundred and forty, and on divers other days and times between that day and the time of the commencement of this suit, wrongfully and injuriously erected and made, and caused and procured to be erected and made, on the said piece of ground so being contiguous and near to the said dwelling-house and premises of the said plaintiff as aforesaid, a certain slaughter-house, and divers, to wit, ten cattle-pens, ten sheep-pens, ten calf-pens, and ten hog-pens, and the same so erected and made, wrongfully and injuriously kept and continued for a long space of time, to wit, from the day and year aforesaid hitherto, and on divers days and times during the said space of time, killed and slaughtered divers cattle and beasts, to wit, five thousand oxen, five thousand cows, five thousand calves, ten thousand sheep, and ten thousand hogs, in the said slaughter-house, and put and placed, and caused to be put and placed,

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in and near the said slaughter-house, cattle-pens, sheep-pens, calf-pens, and hog-pens, divers large quantities of blood, garbage, and offal arising from the carcasses of the said cattle and beasts, and the same so there put and placed wrongfully and injuriously kept and continued for divers long spaces of time, to wit, from the day and year aforesaid hitherto; whereby, during all the time aforesaid, divers noxious and offensive smells and stenches arising from the said blood, garbage, and offal, penetrated and entered and came into the said dwelling-house of the said plaintiff, and rendered the same unwholesome, uncomfortable, and uninhabitable; and the said defendant also, on divers days and times during the space of time aforesaid, wrongfully and injuriously kept and continued in the said slaughter-house, cattle-pens, sheep-pens, calf-pens, and hog-pens, divers, to wit, fifty oxen, fifty cows, fifty sheep, fifty calves, and fifty hogs; by means whereof divers loud and offensive sounds and noises arising from the bleating, lowing, and grunting of the said sheep, calves, oxen, cows, and hogs, entered and came into and about the said dwelling-house of the said plaintiff, and further greatly annoyed, incommoded, and disturbed the said plaintiff, together with his said family, in the possession, use, occupation, and enjoyment thereof, so that by means of the several premises aforesaid, the said plaintiff hath been, during all the time aforesaid, and yet is, greatly aggrieved, disturbed, and annoyed, injured, and prejudiced in the possession, use, occupation, and enjoyment of his said dwelling-house and premises, with the appurtenances, and hindered and prevented from occupying the same in so ample and beneficial a manner as he otherwise might, could, would, and ought to have done, to wit, at the place aforesaid."

There were three other counts, substantially like the first, changing only the manner and form of stating the nuisance, and the injuries arising therefrom; and concluded as follows: "To the nuisance of the said dwelling-house and premises of the said plaintiff, and to his damage of five thousand dollars, and therefore he brings suit," &c. There was no allegation that the plaintiff was *seized in fee* of the prem-

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ises occupied by him, or that he had a *freehold estate* therein.

The defendant put in a plea of not guilty in the usual form. The cause was tried at the Oneida circuit, before the Hon. PHILO GRIDLEY, circuit judge, on the fourth Monday of September, 1845. The jury found the defendant guilty, and assessed the damages of the plaintiff at \$250.

The defendant moved, in the supreme court, to arrest the judgment, which motion was denied, and judgment filed, Oct. 30, 1845. There was no judgment that the nuisance be removed. The defendant brought error, and removed the record of judgment to the court for the correction of errors, and upon allegation of diminution in the record, and writ of certiorari, caused the writ of nuisance, and the rule denying the motion in arrest of judgment, to be certified to the court of errors. An assignment and joinder in error were then put in. The cause, by operation of law, was duly transferred to this court.

Thomas H. Flandrau, Attorney, and
Wm. Tracy, Counsel for plaintiff in error.

First. This action is the assize of nuisance of the common law as modified by the provisions of the revised statutes, but not altered or modified by any other statute, resolution of the courts, or rule of practice. It is not the common law remedy as it might have existed modified by acts of parliament and rules of practice in England on the 19th of April, 1775, but the original remedy changed only by the revised statutes. (*Constitution*, art. 8, § 13; 1 R. S. p. 46 in 3d ed.; 2 R. S. 332, 3d ed. p. 427, §§ 1, 3, 7.)

Second. The writ of nuisance could be maintained only by the owner of the *freehold* affected by the nuisance. The tenant of an estate less than a freehold could not bring the action. The revisors, in continuing the action, preserved this one of its peculiar features. (*Shepard's Grand Abr.*, part 2, p. 467, and *authorities there cited*; 3 Bl. Com. 220, 221, 222; *Rastell's Entries*, 441; *Fitz. Nat. Brev.*, 426, marg., page 183; 1 Com.

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Dig. "Assize," b. 4, b. 5, *marg.*, p. 694; *L'd Raymond*, 9; 1 *Rolle*, 271, l. 8, 12, 15; 2 *R. S.* 332.)

Third. The action being no otherwise changed by the statute, all its incidents not affected by the statute remain. The rules of pleading recognized by the common law, where not changed by act of the legislature or the express rules of practice of our courts, must therefore govern it. (*Harrison v. McIntosh*, 1 *John.* 384; *Hopkins v. Hopkins*, 10 *T. R.* 369.)

The following well established rules must apply:—

1. That the count must follow and be comforable to the writ: 6 *Com. Dig. Pleader*, c. 13, c. 14; *Co. Lit.* §03, a; *Bac. ab. Pleas and Pleading*, b. 4, p. 12; *Gould's Pl. Ch.* 4, §§ 1, 51.)

2. That the count must set forth plainly and with certainty every fact and circumstance material for the maintenance of the action. (6 *Com. Dig. Pleader*, c. 22, c. 34, c. 50, c. 76; *Pinckney v. Easthund. in Rutland*, 2 *Saunders R.* 379, 380; *Bac. ab. "Pleas and Pleading,"* b. 4, *above cited*, b. 5; *Van.* 8, 58; *Gould's Pleading*, ch. 4, §§ 7, 8, 11, 12, 24, 26, 51.)

It follows, therefore, that in the count upon a writ of nuisance, the following fact be stated:—

1. That the plaintiff owned the premises affected by the nuisance as *his freehold*.

2. That the defendant erected the nuisance to *its* injury.

Fourth. In each of the counts contained in the declaration in this case, the necessary fact that the plaintiff held as *his freehold* the premises affected is omitted. He declares upon a *possessory* interest only. He simply alleges that he "*hath been and is possessed,*" &c. They are therefore all bad for *defect of substance*, and are not cured by verdict.

A verdict only cures such omissions in the count as must necessarily have been proved in order to support the allegations contained in it, nothing more. It only advises the court that each fact alleged in the count is proved as alleged. (*Avery v. Hoole*, 2 *Cowper*, 825; *Graham's Pr.*, 2d ed., 657, and cases there cited; *Bishop v. Hayward*, 1 *T. R.* 470; *Sweetapple v. Jesse*, 5 *Barn. & Adol.* 27; 27 *E. C. L.* 25; *Harrison v. McIntosh*, 1 *J. R.* 380; *Hopkins v. Hopkins*, 10 *J. R.* 369.)

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Fifth. Each of the counts in the declaration being defective in substance, and showing no title in the plaintiff to recover, the supreme court erred in denying the motion in arrest. (*Gr. Pr.* 641, and cases there cited, viz., *Sweetapple v. Jesse*, 5 *Barn. & Adol.* 27; 2 *Chitty's Archbold*, 948; 5 *Coke*, 45, *Freeman's case.*)

Sixth. Another peculiar feature of the assize of nuisance is, at any time while the writ is pending the defendant may abate the nuisance, and the writ itself shall thereupon abate. (*Fitzherbert Nat. Breb.* p. 426, note a, citing 2, h. 4, 11, 6th ed. 2, and ass. 454.)

Seventh. The action of nuisance retains its ancient character of a *real action*. The terms employed in the revised statutes abolish real actions, except this. It varies widely in its character from personal actions. (2 *R. S.* 343, § 24, 3d ed., 436.)

1. It is not classed by the revisors with personal actions, but with ejectment, partition, waste and proceedings to quiet a title. (2 *R. S.* 302, 3d ed., p. 399.)

2. It is not commenced as personal actions are, by *capias* or declaration, but by writ. (2 *R. S.* 357, 3d ed., 440.)

3. The writ need not necessarily be served personally, but may, in case defendant cannot be found, be served by leaving a copy at his dwelling-house. (2 *R. S.* 332, § 4, 3d ed., 427.)

4. In case of default, instead of an ordinary inquest, the sheriff takes a jury to view the premises and inquire of the nuisance as well as of the damages. (2 *R. S.* 332, § 5, 3d ed., 427.)

5. There is no repeal of the common law provision that, pending the suit, the defendant may abate the nuisance, and thus abate the suit.

Eighth. The plaintiff below cannot avoid our conclusions as to the defect in his declaration by calling his action anything else than a writ of nuisance. It is either that or nothing. It is commenced by the original given by the statute. It recites the original, as a declaration in that action should, and concludes as well as commences in nuisance. The difficulty with it is, that if the declaration be true in every particular, it does not authorize a recovery in that action. (2 *R. S.* 347, § 1.)

1. It is not enough to say that the declaration contained all which would be necessary to show in order to warrant a recovery in an action upon the case for a nuisance. Such an action is a *personal action* for the recovery of damages only, the proceedings in which are regulated in chapter 6 of the 3d part of the revised statutes, (3d ed. vol. 2, p. 439;) and it must be commenced against a natural person only by *capias* or by declaration. It could not be commenced by original writ issuing out of the supreme court. (*Hayward v. Hoyt*, 9 *Wend.* 484; *McMurray v. Rawson*, 3 *Hill*, 59; *Kent v. McNeal*, 1 *Den.* 436.)

2. If the plaintiff below desired to recover damages for the injury to his possession, he might have brought his action on the case for a nuisance. He did not do this. He elected the more severe common law proceeding by original writ, in order to be enabled by his judgment to throw down the defendant's erection, and having chosen his form of action, he must keep within the rules which govern it. (3 *Bl. Com.* 220, and *authorities under the last subdivision.*)

3. The plaintiff, by electing the remedy of writ of nuisance, gave the defendant the right to abate the nuisance pending the suit, and thus abate the writ. If the plaintiff is permitted to change his action after it is commenced, he may deprive a defendant of this right peculiar to the writ of nuisance.

4. The fact that the supreme court gave such a judgment upon the verdict as if the suit had been an action on the case, will not change the action nor cure the defect we complain of. If an action on the case for a nuisance can be commenced by original writ, there is no good reason why any other action on the case may not; as, for instance, slander, or *assumpsit*; nor why one may not commence any such action by a summons in waste issued pursuant to the statute. (2 *R. S.* 333, 3d. ed. 428.)

5. The decision in the case of *McFarland v. Townsend* (17 *Wend.* 440) does not affect this case. That case was decided upon the ground that the fact that the defendant was brought into court by a writ of nuisance did not appear, and that the declaration was a good declaration in the action it purported to be in, which was trespass. All the remainder of the

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decision was *obiter*. (*Nichols v. Renss. Mutual Ins. Company*, 22 Wend. 128.)

Our claim is *not* that the declaration is in another form of action from the writ, but that it is a declaration in the same form of action, and that it fails to make out a title in that form of action. (*Turing v. Jones*, 5 T. R. 402; 2 Wils. 394.)

Ninth. The plea of the defendant below taking issue upon the declaration did not cure its defects. If a declaration be deficient in substance, the plea cannot make it good. (*Doctrina placitandi*, 69; *English v. Burnell*, 2 Wilson, 260; *Bain v. Clark*, 10 Johns. R. 424; *Doctor Bonhome's case*, 8 Co. 114; 1 Salk. 364; *Carth.* 371; *Pelton v. Ward*, 3 Caines, 76; *Hill v. Stocking*, 6 Hill, 289; *Harrison v. McIntosh*, 1 J. R. 380; *Hopkins v. Hopkins*, 10 J. R. 369; *Frary v. Dakin*, 7 J. R. 75; *Crozier v. Bartlet*, 17 J. R. 439; *Bank of Utica v. Smedes*, 3 Cow. 662; *Allen v. Crofoot*, 7 Cow. 46; *White v. Delavan*, 21 Wend. 26; *U. States v. Hungerford*, 2 Hill, 59; *Hill v. Stocking*, 6 Hill, 287.)

A. C. Harris, Attorney, and
Charles P. Kirkland, Counsel, for defendant in error.

☞ Declaration in case; plea, do.; verdict, do. ☞

First. The declaration in this cause is *in case* for nuisance, a mere *personal action*. (2 Chit. Pl. 769–776, Phil. ed. 1828.)

Second. It can not be in the *real action* of nuisance, as it omits the distinguishing and vital feature of that action, viz.: the averment of *freehold* or *seizin in fee* in *plaintiff and defendant*. (*Rast. Ent.* 441; *Yates Pl.* 520, 521; 2 R. § 257, § 3; 3 Christ. Bl. 220; 16 Vin. Ab. 22, *Nuisance D*; Fitz. N. B. 183, 4, 5; 2 Saund. Pl. and Ev. 229, 686; 1 Com. Dig. 306; D. 1; 3 Ch. Bl. 222; 16 Vin. 33, *Nuisance, K.* 2; 2 R. S. 256, 7, § 7.)

☞ Must be freehold in both parties. ☞



☞ In nuisance, must state injury to plaintiff's *freehold*, and in addition to praying damages, pray *abatement of the nuisance*. ☞

Third. The *plea* is the proper plea in the *personal action*, not in the *real*. (*Jacks. Tr. Real Prop.*; app. 360, 362.)

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Fourth. The statement in the prefatory part of the declaration, as to the manner in which the defendant below was brought into court, is perfectly immaterial. It may have been good ground of *special demurrer*, but nothing more.

Fifth. The only mode of taking advantage of a variance between the writ and declaration, as not being in the same action, was by motion to set aside the declaration for irregularity. (1 *Wend.* 305; 4 *J. R.* 484; 12 *Wend.* 271.)

 Could not even have pleaded in abatement. (17 *W.* 440.) 

Sixth. It is not pretended that in this action, as stated in the declaration, the plaintiff is or possibly could be entitled to the judgment of removal given by the statute in the real action of nuisance. No such judgment has been asked for or rendered—but the plaintiff was entitled to his judgment on the verdict for his damages with costs as in any other personal action: and this is the judgment and the only judgment that has been rendered.

Seventh. The plaintiff in error neither has nor pretends to any *merits*—his ground is purely and merely *technical*; and he could have availed himself of it only as a *matter of practice* by motion to set aside the declaration for a technical variance. (2 *R. S.* 344, § 7, *sub.* 4, 2d. ed.)

DECISION—*judgment affirmed, unanimously.*

NOTE.—BRONSON, Judge, delivered the opinion of the court, and *held*, that it was an action on the *case*. That it was not necessary to mention the form of the action in the commencement of the declaration; that was determined by the *matter* contained in the declaration—not by the name which the plaintiff might give it.

As to the *writ*. It was of no importance how the defendant came into court. It was enough that he appeared and pleaded to the declaration in an action of which the court had jurisdiction. He could not afterward object, that he was not regularly brought into court, or that the declaration varied from the process.

Reported 1 Comstock, 223.

APRIL TERM, 1848.

(Held at the City Hall, in the City of New-York.)

THE MUTUAL INSURANCE COMPANY OF THE CITY AND COUNTY
OF ALBANY, appellants, *agt.* CONOVER, respondent.

Questions discussed.

1. Whether the circuit judge admitted improper and illegal evidence to be given to the jury, in showing, or tending to show, that the secretary of the company had waived the delivery of the *preliminary proofs* of the loss within the time required by the laws and conditions of the policy of the company?

And, whether the testimony of the secretary, that he was in the habit of using his discretion in consenting to the *assignments of policies*, was properly admitted?

2. Whether by the by-laws and policy of the company, the secretary had authority to assent to the giving of a mortgage upon the premises insured, by the assured, and to give a written consent to an assignment of the policy to the mortgagee?

This was an action of assumpsit brought by Conover against the Mutual Insurance Company of the city and county of Albany, upon a policy of insurance, dated July 22, 1836,—tried on the 17th April, 1845, at the Albany circuit, before Hon. AMASA J. PARKER, circuit judge.

The pleadings form a part of the bill of exceptions.

The plaintiff, to maintain the issue on his part, produced the policy of insurance declared upon, and dated as above, (a copy whereof with the conditions is hereto annexed, marked "A,") the execution of which, by the defendants, was admitted by their counsel, and the said policy and conditions were read in evidence to the court and jury. It was admitted that the dwelling-house, number 34 Van Schaick-street, mentioned in said policy, and insured thereby for the sum of \$600, and the wood-house in the rear of said dwelling, also mentioned in said policy, and insured for \$66, were consumed by fire on the eighteenth of August, 1838. That the said dwelling-house, at

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the time of the fire, was of the value of \$600, and no more; and that the value of the wood-house in rear thereof, at the time of the fire, was \$66, and no more. It was also admitted that Robert Gridley, on the second of October, 1838, swore to the affidavit, forming preliminary proofs, and that on the same day it was handed to Mr. Joice, the secretary of the company. But its admissibility as evidence was objected to on the ground of variance, the averment in the declaration averring that the *plaintiff* had subscribed and sworn to said affidavit, and then that the policy required the insured to make said affidavit, and also on the ground that it was not received within thirty days after the fire, as required by the conditions of the policy. The circuit judge overruled the first objection, and admitted the same in evidence, reserving the second objection to be obviated by proof, and the defendants' counsel excepted.

The affidavit of Robert Gridley, showing the assignment of the policy by Conover, the plaintiff, to him on the 16th May, 1837, and the loss by fire of the buildings insured, on the 18th August, 1838, was then read in evidence.

The testimony is given entire, in order to a proper understanding of the questions raised and discussed on the argument.

A. D. Robinson was then called and sworn as a witness on the part of the plaintiff, and testified as follows:—

A short time after the fire I took the policy, went to Mr. Joice, who was secretary, as I supposed; showed him the policy, and told him Mr. Gridley was out of town, and as his agent or attorney, I don't know which, I offered to pay any back assessments; I told him that the premises were burned, and we would expect the insurance. The reply he made was, that the insurance would not be paid, as the property had been conveyed. He gave no other reason that I recollect that the insurance would not be paid, except that the premises had been conveyed by plaintiff. [The testimony of this witness was objected to in time, on the ground that the secretary had no authority to waive any condition of the policy, nor is there any evidence of such authority, and that the averment in the declaration was of a performance of the condition, and not that

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it had been waived. The objection was overruled by the circuit judge and the testimony admitted, and the defendants' counsel excepted.]

George W. Peckham was then sworn as a witness on the part of the plaintiff. [The testimony of this witness was objected to, on the same ground as the last. The objection was overruled, and the defendants' counsel excepted.] The witness says, on the 16th of May, 1837, the date of the consent to the assignment on the policy, I called on Mr. Joice, the secretary of the company, and stated to him that Gridley was about to loan plaintiff \$500, for which he was going to, or wanted to give a mortgage on the insured property. That Gridley would let him have the money, provided he would give consent to the assignment of the policy, as security for the mortgage, and I asked for that consent, upon that application; Joice wrote the consent on the policy, as follows: "I consent that the within policy be assigned to Robert Gridley. Albany, May 16th, 1837. E. V. JOICE, Secretary." And signed his name to it; after he had signed the consent, the policy was taken to my office, and the assignment was drawn and signed by Conover, and the said assignment was read in evidence to the court and jury in the words and figures following:—

"In consideration of one dollar, I hereby assign the within policy to Robert Gridley, as collateral security for the payment of five hundred dollars, and interest.

"16th May, 1837. [Signed] NICHOLAS CONOVER."

Within about a week after the fire, I called on Mr. Joice, and told him Mr. Gridley was out of town and could not make the affidavit within the thirty days, and stated that if it would make any difference, we would endeavor in some way to supply it; Joice replied that it would make no difference, that they would not pay the insurance, for the reason that Conover had conveyed the premises subsequent to the assignment of the policy to Gridley; and thinks, but is not certain that he reiterated that it would make no difference. He answered that no technical advantage would be taken on such ground.

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Cross-examined. I had two interviews ; at the first interview, after I had stated Gridley's absence, &c., Joice said that would make no difference, the insurance would not be paid for the reason that Conover had conveyed subsequent to the assignment ; this was within a week after the fire ; I think the second interview was within the thirty days after the fire, but I am not positive ; I think I asked Joice if he would give me a memorandum as to the delivery of the preliminary proofs after the thirty days, and I think Joice then said there would be no technical objections on that ground ; I think I recollect having this conversation, but can't be positive.

Direct examination resumed. After the consent to the assignment on the 16th of May, 1837, the mortgage for \$500, and the assignment of the policy, were delivered to Gridley, and he then let Conover have the \$500. The mortgage is dated May 16th, 1837 ; I don't recollect whether the mortgage was handed to Gridley before or after I went to get the assignment to the policy.

E. V. Joice, sworn as a witness for the plaintiff, says, I was secretary of the company on the 16th of May, 1837, and I had been since the organization of the company ; and I continued to be secretary until the winter or spring of 1840. [The witness is asked what has been his habit of consenting to the assignment of policies as secretary for the company. This question is objected to ; the objection overruled, and the defendants' counsel excepted.] The witness answers, My practice has been to use my discretion, as to whether I would consent to the policy being assigned or not ; I did give such consent to such assignment, and without laying it before the board of directors ; I can't state as to how common it was, but I consented to the assignment whenever any consent was given. There was no other agent of the company in the city except myself. These assignments were made occasionally to secure mortgages given on the premises ; I have no recollection of laying a case of the kind before the directors ; I thought I had authority to do so ; I have no recollection of refusing when I thought it a proper case. The company had no other agent

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in the city except myself; I transacted the business of receiving applications for insurance, and giving policies; I can't say that the occurrences were frequent of policies being assigned to secure a mortgage; I have no recollection of an instance of a written representation being made to the company for their consent to the giving a mortgage; I have no recollection of the board of directors being convened to take such a subject into consideration; I don't know whether I was one of the executive committee; I think there was a book where there was an appropriate place to enter assignments of policies; I kept the only office where there was any business to be done with that company.

Question. Did your office have the company's sign over the door?

[Objected to as irrelevant. Objection overruled, and the defendants' counsel excepted.]

Answer. Yes, I was the only agent of the company acting at that office, except when the president was present; he had as much authority as I had. I recollect Mr. Robinson and Mr. Peckham calling on me about the preliminary proofs; I recollect something being said about furnishing preliminary proofs; I said to them, all other things being fair, I would not be captious about the time of the delivery of the preliminary proofs; I recollect the grounds they intended to put the defence on, but whether I stated it then or not I don't know. They had heard at the time of the fire that Conover had mortgaged and conveyed the property.

Cross-examined. Says, I was secretary, treasurer, director, and attorney of the company; as director, I had no more power than any other director; as secretary, I had no power except what was given me by the by-laws, unless there were sometimes resolutions giving the secretary specific directions; I don't know that I had power to dispense with any condition in any policy. The book now shown me is, I believe, a copy of the charter and by-laws of the company, adopted while I was secretary. (A copy whereof is hereunto annexed, marked "B," forming part of this bill of exceptions.) I have never intended

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to waive any provision in the policy ; if I have done it, I have done it under a misapprehension.

Defendants' counsel asked, Did you ever undertake to consent to an assignment of a policy to secure a mortgage on the premises? Witness says, I did so in this case, and I always supposed there was something in the by-laws, or in some resolution, authorizing me to do it.

The following condition in the policy was then read to the witness :—

“ Whenever any one hereinafter insured shall alienate conditionally, by mortgage, his policy shall be void, unless he shall make representation thereof in writing to the directors, stating the amount, and to whom mortgaged, who shall have power to give their assent to said mortgage, or to cancel said policy, as they judge proper on examination of the same, or take other security.”

The witness says, I must have dispensed with that condition in the policy in this case, and I think there was something in the resolutions authorizing me to do so ; I have never intentionally undertaken to violate any provision ; if I have done it, I have done it under a misapprehension ; I have a distinct recollection that originally it was required that this giving of a mortgage should be made kown in writing to the board ; but I had understood afterward that this was dispensed with by the board, and my answer is, that unless the authority to waive the written statement is contained in the by-laws or minutes of the company, then I had no direct authority ; I do not recollect the application for consenting to assign this policy. The charter of the company is dated the 3d of May, 1836 ; the company was organized in the summer, or in September following ; I communicated to Doctor Staats, the president, whatever occurred in his absence whenever he returned to the office ; I have no recollection particularly about assignments, but only generally ; I told him all that transpired in relation to the company ; I have no recollection of telling him about the assignment of any particular policy ; Staats was very active about the business of the company, and was in there every day ; I

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have no recollection of Gridley's signing any premium note; I have no recollection of any notice being given to the company of any alteration in the insured premises; it was my duty to enter in the minutes of the company all resolutions passed by the board.

Direct examination resumed. My acts in consenting to assignments were never questioned by any of the board; I think the directors must have known that such consents were given by me; I mean that I have no recollection of giving to Staats a statement of any particular policy issued, or of any particular assignment consented to; I did, however, make known to him what concerned the company in all things; I have no knowledge of any other than myself consenting to the assignment of a policy while I was there; the general business I transacted for the company consisted chiefly in issuing policies, entering them in the proper books, receiving premiums, consenting to assignments, making alterations in policies as to location and premium notes.

[The witness was asked whether the company ever found fault with him for any act he ever did, on the ground that he had exceeded his authority? The question was objected to by defendants' counsel, and the objection overruled by the court, and the defendants' counsel excepted.]

Answer. They never did. *By the court.* I don't recollect whether the assignment of this policy was ever recorded, or whether my consent was ever recalled.

Cross-examination resumed. I don't know whether there was a separate book kept for entering consents and assignments, or whether they would be entered on the copy of the policy in the policy book; I never considered it important to record the consent to assignments of policies, because when the policy was produced to the company, it would appear whether it was properly done; I have no recollection of ever entering them in the books of the company; I don't know whether there was any difference in the form of the consent when the assignment was made to secure a mortgage on the premises, and when made for another purpose; I do not recollect of communicating any

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thing to the board for approval or disapproval. I communicated a great many things to the board when they met; I recollect one risk the board took which I had declined; I don't recollect that the president disapproved of the risk in this case; I don't recollect when I was made a director. The book now shown me contains the minutes of the company while I was secretary. It appears from this book that I was elected a director in May, 1839; I don't recollect whether I was appointed before or not.

James L'Amoureux was then sworn as a witness on the part of the plaintiff, and testified as follows: I was a director in the company when it was organized, and continued such director until May last; I was not intimate with its books while Joice was secretary; I met with the board and transacted business with them; I do not recollect of the board being called upon to give a consent to the assignment of a policy, nor of the board giving a consent, or of any written representation made to the board to consent to a mortgage, or to assigning a policy to a mortgage; consents have been given to the assignments of policies; I do not recollect of their having been made by any body except the secretary.

[Plaintiff's counsel offered to show by this witness that the practice of consenting to the assignment of a policy to secure a mortgage, as was done in this case, had been continued by the secretary who succeeded Mr. Joice up to May last. The defendants' counsel objected to this testimony, and the court overruled it.]

Being cross-examined, the witness says: I have no knowledge of Mr. Joice consenting to the assignment of any policy prior to 1838, or at any time; the fact that Mr. Joice ever undertook, as secretary, to consent to an assignment of a policy to a mortgage was never communicated to the board to my recollection; nor did I know that he ever gave such consent until after he ceased to be secretary.

Direct examination resumed. The witness says: I have no recollection of having heard that Joice had consented to any assignment of any policy prior to August, 1838.

E. V. Joice, recalled by defendants' counsel, says: I have

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examined the books, and I find no resolution of the board authorizing the secretary to consent to the assignment of policies. The by-laws were never entered in any book. The witness is shown the policy book, and after examining, the witness says the date of the first policy entered is the 15th of March, 1837: we had issued a number of policies before we commenced recording them. That is the policy book of the company while I was secretary; there is no entry in the minutes of my being made a director until May, 1839.

Direct examination resumed. The witness says: The meetings of the board of directors were held at my office; I doubt whether I was a director before 1839.

Here the plaintiff rested, and the defendants' counsel moved for a non-suit, on the following grounds:—

1. The preliminary proofs were not delivered within the time required by the conditions of the policy, and the secretary had no authority to dispense with that condition precedent in the policy.

2. There is no proof that the company ever authorized the secretary to consent to the assignment of this policy, or ever ratified, or knew of that, or any similar act of the secretary, and therefore that that condition of the policy and provision of the by-laws were not complied with.

3. That by the charter of the company the board itself could not permit this assignment, unless the mortgagee complied with the provisions of the 7th section of the charter, and there is no evidence of such compliance or of any attempt to comply with the provisions of said section.

4. By the terms of the policy and the by-laws, the plaintiff could only be insured to the amount of two-thirds the value of the property insured, and it appears the plaintiff has procured this policy for the whole value of the buildings, and the policy is therefore void.

5. If the policy has been transferred to Gridley, as authorized and directed by the charter and by-laws, then this suit cannot be maintained in the name of Conover, the present plaintiff.

The circuit judge overruled the motion for a non-suit, and

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the defendants' counsel then and there excepted. The defendants' counsel then read in evidence a quit-claim deed of the premises insured, and destroyed by fire, as aforesaid, from Nicholas Conover and wife to Abel Conover, dated the 7th day of August, 1837, and recorded in book of deeds No. 58, page 229, &c., of Albany county records.

The plaintiff's counsel objected to the reading of this deed in evidence, and the objection was overruled by the court.

Barent P. Staats was then sworn as a witness on the part of the defendants, and testified as follows: I have been president of this insurance company ever since its organization; I never knew or heard that Joice, as secretary, had consented to the assignment of policies until after this suit was commenced, and I heard it proved on the trial.

Cross-examined. I don't know of any policy being assigned while Joice was secretary. I am a stockholder in the company; I don't recollect that Mr. G. W. Peckham called on me to consent to the assignment of a policy, and that I referred him to Joice; our company did a considerable business; several hundred policies were issued; I presume there have been many policies assigned in insurance companies in this city every year, and probably also in this company. It is not likely that I can remember all the communications Joice made to me as to the policies and their assignments; I don't pretend that I can now remember a policy I had assigned of my own; it was assigned by consent of the board, and not by that of Joice.

The policy was then found in the book of policies, and was dated 31st March, 1837.

On looking at the book of minutes, witness says: I find no resolution in the minutes of any consent of the board to my assigning my said policy; the consent was endorsed on the back of my policy, and signed by Joice. [On its being read, it was precisely in the form of the consent to the assignment in this case.] Witness says his consent to my assignment was given about a year after the policy was issued; I stated to the board I wished to have my policy assigned, that I have before spoken of; I made no written statement to the board about it; it was

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assigned to secure a mortgage given on the insured premises after the policy was issued; there was no written statement about it; I can't tell who was present at the meeting of the board; I can't state one; there must have been some. [The book of policies produced was then examined, and every policy found assigned was consented to by Joice, as done in this case, as appeared thereby.] The book now shown me contains the charter and by-laws of the company; the by-laws are the same as originally adopted, except that the provision giving to the company the right to rebuild the property burned has been added since Joice was secretary.

The testimony here closed, and the defendants' counsel insisted that there was not sufficient evidence to carry the cause to the jury, and again moved for a non-suit on the same grounds as before taken for that motion. The circuit judge overruled the motion, and decided that there was evidence enough on the question of agency to carry the cause to the jury, so far as regards the question of fact raised by the defendants' counsel. To which decision the defendants' counsel excepted. The defendants' counsel insisted that if the plaintiff was entitled to recover at all, he could in no event recover more than the amount for which he held the policy as security, with interest. The circuit judge so decided and charged the jury, and the defendants' counsel declining to sum up the cause, the case was submitted to the jury under the charge of the judge, who found a verdict for the plaintiff for \$777.09 damages, and six cents costs.

The supreme court, in July term, 1846, confirmed the verdict, and gave judgment for the plaintiff. (*Reported 3 Denio, 254.*)

The defendants brought their writ of error, and removed the judgment to the court of errors, which was subsequently transferred to this court.

*Charles H. Bramhall, Attorney, and
Samuel Stevens, Counsel, for plaintiffs in error.*

 *Dates.*—Policy, July 26, '36. Consent, mortgage, and assignment, May 16, '37. Fire, Aug. 18, '38. Deed of Conover, Aug. 7, '37. 

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First. The circuit judge admitted improper and illegal evidence to be given to the jury.

1. The preliminary proofs were illegally admitted. (*Folios* 175 to 180.)

That proof did not sustain the averment in the declaration. (*Folios* 50, 51, 100, 148.)

Nor did it comply with the requirements and conditions of the policy. (*Folios* 226, 241, 287.)

2. Proof showing, or tending to show, that the secretary had waived the delivery of the preliminary proofs, within the time required by the by-laws of the company, and by the conditions of the policy itself, was improperly admitted. The secretary had no authority to deprive the company of the benefit of that or any other condition in the policy. (*Folios* 181, 185.)

3. The proof that the secretary consented to the assignment of policies was improperly admitted. (*Folios* 102 to 184.)

The secretary has no power of assenting to the assignment of a policy, except in the two cases provided for at folios 282 and 285-6. There is not the least pretence of authority in the secretary to consent to the assignment of a policy to secure a mortgage. That case is specially provided for in the policy itself, and also in the by-law. (*Folios* 238, 285.)

See Corp. 110-113, 2d ed., 256, 3d ed.; *Wheat.* 113; *Mass.* 58; *do.* 29; *Pick.* 516-17.

4. The testimony of the secretary, that he was in the habit of using his discretion in consenting to the assignments of policies, was improperly admitted. (*Folio* 188.)

5. Proof that the company's sign was over the door of the secretary's office, was wholly immaterial. (*Folio* 191.)

6. Proof that the company never found fault with the secretary, on the ground that he had exceeded his authority, was improperly admitted. (*Folio* 199.)

There was no proof that the directors ever knew of the act in question, or any similar act.

Second. If the court shall hold any part of the proof objected to irrelevant, or inadmissible for any other reason, the judgment must be reversed, and a new trial granted. (*Marquand v. Webb*,

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16 J. R. 92; *Osgood v. Manhattan Co.* 3 Cow. 621; *Myers v. Malcolm*, 6 Hill, 296.)

Third. The circuit judge erred in refusing to nonsuit the plaintiff. (*Folios* 206 to 209 and 214.)



1. The preliminary proofs were not delivered within the time required by the policy, and no authority whatever is shown in the secretary to dispense with that condition precedent in the policy.

2. No authority was shown in the secretary to assent to the mortgage given by the assured to Gridley, and the giving of that mortgage avoided the policy, unless the mortgage was assented to by the directors, as required by the by-laws, and also by the policy. (*Folios* 194, 226, 238, 285.)

3. The property insured was alienated by the assured after the issuing of the policy, within the words, spirit, and intent of the 7th section of the charter of the company, (*folio* 250,) and the policy thereby became void.

(1.) The mortgage to Gridley was a conditional alienation of property.

(2.) The property was absolutely conveyed by the assured on the 7th of August, 1837. The restrictions in the charter are for the benefit of the stockholders, and cannot be dispensed with or evaded, even by the board of directors, much less by an officer of the board.

 **REPLY.**—14 *Mass.* 61-2; 2 *Dow. Pr. R.* 210,—lease is alienation. 

Joseph S. Colt, Attorney, and

Rufus W. Peckham, Counsel, for defendant in error.

First. The first exception was taken to the admission of the affidavit of the fire, on two grounds. (*Folio* 176.)

1. For variance from the declaration. (*Folio* 176.) The declaration averring it was made by the assured; whereas, it was made by the assignee. (*Folio* 100.)

2. That the *assured* should make the affidavit.

3. Because the affidavit was not made within the thirty days.

The first ground of objection presents at most a mere ques-

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tion of variance, which, it is too well settled to require the citation of cases, may be disregarded by the circuit judge on the trial; and the exercise of this discretion will not be reviewed on error. (2 R. S. 206, § 79; *Mappa v. Pease*, 15 Wend. 669; *Mann v. Herk'r Ins. Co.* 4 Hill, 187; *The Traders' Ins. Co. v. Robert*, 9 Wend. 165, 404. *Where the facts are entirely parallel.*)



Another answer is, that the party in interest is, in reality, "the plaintiff."

The second ground of objection is not clear—whether it claims a variance from the declaration, or a non-compliance by the proof with the requirements of the policy. In either view it is without force. As a variance, if any, it might be disregarded at the trial. Another answer,

If the policy had been assigned, as the plaintiff claims and proves, then the assignee was "the assured," the real plaintiff. (9 W. 165.)

The third ground—the making of the affidavit within the thirty days—was waived by the company, through their secretary and general agent. (*Folios* 180 to 188.)

Second. The exception that performance and not a waiver had been averred in the declaration, does not rise to the dignity of a variance. It is the proper mode of declaring. But if it be a variance, then the judge had a right to disregard it. (*Folio* 181; 2 *Chit. Pl.* 9th ed. 157, note y; *Williams v. Matthews*, 3 Cow. 252; 5 *Pick.* 436, and *Traders' Ins. Co. v. Robert*, 9 Wend. 404, *entirely analogous.*)

 May aver performance, and prove it by waiver—waiver is equal to performance. 

Third. The decisions made by the circuit judge during the examination of the witness Joice were right. In fact, the objections to them were not insisted upon, but were all abandoned on the argument, in the supreme court.

Fourth. The motion for a nonsuit was properly overruled upon all the grounds presented. (*Folio* 206.)

Clearly so when the testimony closed on both sides. (*Folio* 214.)

1st Ground. The secretary, Joice, being a principal officer and agent of the company, his authority to waive any defect in

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the preliminary proof should be presumed until the contrary appeared. (*Bank of Vergennes*, v. *Wormer*, 7 *Hill*, 91; *Paley Agency*, 162-3, and note, 2 *Am. ed.*; 15 *J.* 44; *Story Ag.* § 19, 114; 1 *Esp.* 61; 2 *Kent*, 620-1, and note (c); 7 *W.* 31.)

2d. The proof showed him to be a general agent of the company, and that he was the officer who received the preliminary proofs and acted upon them.

His was the only office where the business of the company was transacted, and he was the only agent thereat. (*Folio* 191; *Turley* v. *N. Am. Ins. Co.*, 25 *Wend.* 378; *McMasters* v. *The Western Mut. Ins. Co.*, 25 *Wend.* 381-82; *Ætna Fire Ins. Co.* v. *Tyler*, 16 *Wend.* 401-2—*Opinion of the chancellor*; *Francis* v. *Ocean Ins. Co.* 6 *Cow.* 404; *Do.* 2 *Wend.* 64; *Vose* v. *Robinson*, 9 *J. R.* 192.)

3d. The secretary was the proper organ of the company, and he informed the agents of the plaintiff, when notice of the fire was given to the company, that the company would not pay the insurance at all, on the ground as stated, of the conveyance of the premises by Conover. (*Folios* 181-185; see the three cases last cited.)

This made any preliminary proof unnecessary. (*Folio* 192.) The company had already determined upon their ground of defence, and that they would not pay at all, and their agent made it known, pursuant to their determination.

The case of *Dawes* v. *The N. R. Ins. Co.* (7 *Cow.* 462) is entirely distinguishable from the case at bar. But that case has never been followed, and for the integrity of insurance companies I trust never will be.

2d *Ground of nonsuit.* The secretary had authority to consent to the assignment of this policy.

1. For all the reasons stated under the first ground of nonsuit as to his general authority.

2. He was the only officer that had any authority on the subject of giving consent, or as much authority as any other. (*By-Law*, fol. 285-6.)



3. He had uniformly given such consents, and none had been given by any other officer, or in any other way. (*Joice's Testy.* fol. 189; *Staat's testy.* 212, 213.)

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And the defendants' own books bore full evidence of his authority.

The company cannot say that the book showed no assignment, except such as had been made prior to this. (*Folio* 213.) The inference from the language in the bill is the other way, as was the fact. If otherwise, they had the book, and could have corrected it. Error is never presumed.

Again. Assuming both parties innocent, who should suffer, if either, by the wrong of the defendants' agent, who had given them security in \$5,000 for the proper discharge of his duty? (*Folio* 264; 22 *Wend.* 368, *per Ver Planck, senator.*)

3d Ground of nonsuit. Has no application in this case. Here was no alienation.  1 *Jac. L. D.* 79; 2 *Black. Com.*; *Com. Dig.* ALIENATION; *Vin. Ab. do.*; 2 *Cruise Dig.* 90. 



4th Ground. There is nothing in this ground, if true. But there is no evidence of its truth. At the time of the *trial*, not of the *insurance*, it was admitted that the property burned was of the value insured, and no more. (*Folio* 175.)

5th Ground. Is without force.

The *property* insured had not been aliened to the plaintiff, but only the *policy*.

These are all the exceptions taken, and,

Finally, the recovery is right, and these technical objections, which an individual would be ashamed to interpose, cannot shield this company from doing justice. (16 *Wend.* 404.)

 *No question made upon deed.* And if was, comes to nothing. Deed was after policy, assigned with consent of comp. (9 *W.* 404, 409.) 

DECISION—*judgment affirmed, unanimously.*

NOTE.—JOHNSON, J. *Held*, that whether there was a variance between the declaration and proof was not material to inquire, as it was at most only such a one as the circuit judge might properly disregard on the trial, and upon which no bill of exceptions would lie.

That the consent of the assignment of the policy by the secretary, to enable the plaintiff to procure a loan by a mortgage upon the insured property, was binding upon the company.

GRAY, J., in a short opinion, expressed substantially the same views.

Reported 1 *Comstock*, 290.

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REYNOLDS, plaintiff in error, *agt.* MYNARD and others, trustees, &c., defendants in error.

Questions discussed.

1. Whether a justice of the peace has *jurisdiction* of an action, brought against the trustees of a school district, to recover a portion of a school teacher's wages, where the question has been submitted by the trustees to the county superintendent of common schools, and decided by him?

2. Whether an inhabitant of a school district, who has sent to school, and liable consequently to taxation, to raise funds to discharge the teacher's wages, has such an *interest* as to *disqualify* him from being a *witness* in an action brought to recover such wages?

This action was brought in a justice's court, by Robert Reynolds; against Henry H. Mynard, Alexander Barratt, and Avery Smith, trustees of school district No. 15, in the town of Austerlitz, in the county of Columbia, to recover damages for the breach of a contract made between the parties, by which the plaintiff agreed that his minor son, Truman N. Reynolds, should teach school in said district for the term of four months, at nine dollars per month; and also for the recovery of his wages due upon the contract, alleging that his son entered upon the employment and taught the school according to the contract for the period of three months, and was ready and willing, and offered to teach the remaining month, but that the defendants refused to permit him so to do.

It appeared on the trial that the trustees dismissed T. N. Reynolds, the teacher, for alleged indecorous conduct after he had kept the school for three months, and refused to pay him wages for any longer time; and upon presentation of a statement of the facts made by them, which Reynolds had no opportunity to controvert, obtained the written decision of David C. Wooden, county superintendent of common schools for the county of Columbia, affirming their proceedings, and directing that the trustees should pay the plaintiff for the time his son was actually in school, that is, three months—which decision had not been appealed to the superintendent.

The defendants then, under their notice, asked to be dis-

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charged from the suit, alleging that the justice had no jurisdiction; which application was denied by the justice.

The defendants then introduced testimony, and called one George Adsit as a witness, who was sworn, and having testified that he was an inhabitant of said school district, and had sent to the school taught by plaintiff's son in the district, and had not paid his school bill—was objected to by the plaintiff as a witness, on the ground of interest; and the justice refused to allow him further to testify in the suit.

The defendants then called one Heman Sprague, jr., as a witness, who was objected to by the plaintiff, on the ground that he was interested. Sprague was sworn as to his interest, and testified that he resided in said school district, and owned property liable to be taxed in it; that he sent two scholars to the school taught by Reynolds, and had not paid his school bill. The justice decided that he was incompetent, and refused to permit him to testify in the suit.

After all the testimony had been given on both sides, the justice on the 23d of August, 1844, rendered judgment against the defendants for \$17 30 damages, without costs. The defendants brought certiorari and carried the cause to the Columbia common pleas, where, in October, 1845, the judgment of the justice was affirmed. The defendants thereupon brought a writ of error, and removed the judgment to the supreme court, where, in July term, 1846, the judgment of the common pleas was reversed, with costs: that court *holding*, that the justice erred in rejecting Adsit and Sprague as witnesses for the defendants, on the ground assumed; that their interest was too remote and contingent to *disqualify* them; and at most affected only their credit. The plaintiff, Reynolds, brought error to the supreme court, and removed the judgment into the court for the correction of errors, which was subsequently transferred to this court.

Charles B. Dutcher, attorney and counsel for plaintiff in error.



First. The justice had jurisdiction in this case. (2 *R. S.* 3d ed. 324, § 2; 4 *Hill*, 168; 7 *Wend.* 181; 2 *R. S.* 569, § 110.)



Second. The motion for a non-suit was properly overruled by the justice. (10 *Wendell's Rep.* 519; *Cowen's Treatise*, 880.)

Third. The question put to the witness, Mr. Wooden, by defendant's counsel, was properly overruled by the justice.

Fourth. The witnesses, Adsit and Sprague, were properly rejected on the ground that they were interested. (1 *R. S.* 3d *ed.* 546, § 113—*sub.* 7, 8, 9, 13, 14; *Randall's Common School Digest*, 198; 4 *Hill*, 168; 11 *John. Rep.* 57; 16 *John. Rep.* 89; 9 *Cow. Rep.* 128; 16 *John. Rep.* 70; 5 *John. Rep.* 258.)

Fifth. Whether the trustees were justified in discharging the teacher or not, was a question of fact submitted to, and passed upon by the court below, and this court will not interfere.

 *M'Call v. Smith*, 2 *M'Cord*, 375; 2 *Stark. Ev.* 745, *ed.* 1826; *do.* 779—to discharge district from repair of highway; 1 *Gilb. Ev.* 225, 240, *Lofft's ed.*—as mere *corporator*, interest too remote. But here not only *corporators*, but were the *particular persons to pay the wages*. Only a part of the district or *corporators* had sent to school. And no others liable to tax for teacher's wages, except where some scholars exempted—then a district generally. 

 *Reply*—2 *D.* 609, *Damages*; 1 *Richardson's S. C. Law Rep.* 364. 

P. W. Bishop, attorney, and

Henry Hogeboom, counsel for defendant in error.

First. 1. The justice had no jurisdiction of the cause. (*Decision of superintendent*, 1841, *p.* 180; 11 *Wend. R.* 90.)

2. This case is within the provisions of the act of April 20, 1830, (1 *R. S.* 481.)

3. Deputy superintendents, same power as superintendents. (*Sess. Laws.* 1841, *p.* 236.)

4. Teachers are presumed to make their contracts with full knowledge of the law. (*Decis.* 1837, *pp.* 101–2.)

Second. 1. The justice erred in refusing to non-suit plaintiff



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when he rested his cause, for the reasons mentioned in first point.

2. The justice erred in refusing to non-suit plaintiff, when the defendants rested and made the motion. It then appeared plaintiff's son was hired upon *condition* that he kept a good school, obtained the certificate of the superintendent, &c. These averments are not in the declaration. (*Cow. Tr.* 583; *do.* 96-7; *do.* 591 to 594; *do.* 918 to 921.)

Third. 1. The justice erred in permitting plaintiff to prove contents of affidavit, without requiring its production. (*Cow. Tr.* 924-5.)

Fourth. 1. The justice erred in excluding the testimony of Adsit and Sprague. (*Starkie on Evidence*, 85-6; *do.* 101-2; and *note D.*; *do.* 124; 8 *John. R.* 462; *Falls & Smith v. Belknap*, 1 *do.* 491; *Cowen v. Hawes*, 11 *do.* 76; *Bloodgood v. Overseers of Jamaica*, 12 *do.* 285; 1 *Cowen and Hill's notes to Philips' Evidence*, 92, 37-8, 139, 1541; 6 *Hill*, 407; 4 *Paige*, 510; 2 *R. S.* 481, § 113.)

 Many contingences. So far as appears, Adsit may have been exempt from tax. No proof he had any property. (11 *W.* 92.) 

2. The objection would only go to the credibility of the witnesses. (14 *J. R.* 81-3; 5 *do.* 258; 10 *do.* 21; 9 *do.* 219; 1 *do.* 486; 12 *do.* 285; 5 *Wend.* 55; 3 *Hill*, 579.)

Fifth. 1. The justice erred in permitting plaintiff to prove what board was worth, it not appearing that his son was unable to obtain employment; and he erred in giving judgment for the four months at the contract price. (21 *Wend.* 457; 2 *Denio*, 609.)

2. The justice should have given judgment for only three months' service, as he says himself he was satisfied. Defendants acted in good faith in discharging plaintiff's son, which is the conclusion he comes to upon the evidence, which certainly destroys the effect of the evidence given by plaintiff, that defendants wanted to get rid of his son because they had all "drawn wood," &c.

Sixth. 1. The evidence shows a complete justification on

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the part of the defendants for discharging the plaintiff's son. (*Cow. Tr.* 111-12, and cases there referred to.)

JEWETT, C. J. Several questions were made on the argument, by the counsel for the defendants; but, from the view I take, it is only necessary to examine the question, whether the rejected witnesses, or either of them, were *competent* for the defendants on that trial. The rule is well established that,—

The interest which *disqualifies*, must be some legal, certain, and immediate interest, however minute, either in the event of the cause itself, or in the record, as an instrument of evidence, in support of his own claims in a subsequent action. (1 *Greenleaf Ev.* § 386; 1 *Stark. Ev.* 102; *Stockholm v. Jones*, 10 *John.* 21; *Van Ness v. Tirham*, 3 *Johns. Cases*, 82; *Bent v. Baker*, 3 *Ter. Rep.* 27; *Rex v. Barton*, 4 *East*, 581; 1 *Gilbert Ev. by Lofft*, p. 225.) A remote or contingent interest, only, affects the *credit*. (*Needham v. Law*, 12 *Mees. & Wells*. 559; *Falls v. Belknap*, 1 *John.* 491.) The latter was an action upon a bastardy bond, by the overseer of the poor of the town of New Windsor. On the trial, a freeholder, and inhabitant of that town, was called as a witness, in behalf of the plaintiff, to prove that the town had been damnified, &c. On objection to his competency, on the ground of interest, it was held that although the witness was liable to be rated for the support of the poor of that town, his interest was too remote and contingent to render him incompetent, and the court added that that point had been repeatedly ruled, and was then well settled. The same principle was again repeated and applied in *Bloodgood v. Overseers of Jamaica*, (12 *John. Rep.* 285.)

2 *R. S.*, p. 473, *Article 4*, provides for proceedings by and against public bodies, having certain corporate powers, and by and against the officers representing them. Sec. 92 provides for suits to be brought by certain county and town officers, and by trustees of school districts, upon any contract lawfully made with them or their predecessors, in their official character, to enforce any liability, or any duty enjoined by law, to such officers, or the body which they represent. Sec. 96 provides for actions against such officers, individually, to be commenced in

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the same manner as against individuals, specifying in the process, &c., their name of office. Sec. 100 provides that such suits shall not abate, &c., by the death of such officers, their removal from or resignation of their offices, or the expiration of their term of office; and provides for the substitution of the names of the successors in such office, upon the application of such successors, or of the adverse party. (*Colegrove v. Breed*, 2 Denio, 125.)

Sec. 108 provides that, in such suits, the debt, damages or costs recovered against them, shall be collected in the same manner as against individuals, and the amount so collected shall be allowed to them in their official accounts.

By our common school system, school districts are constituted *quasi* corporations, represented by their trustees for the time being: excepting in such matters as are provided by the statute to be done by the inhabitants thereof, entitled to vote when assembled in school district meetings, and by certain other officers of the district prescribed by statute. (2 *Kent's Com.*, 5th ed., 278; *Silver v. Cummings*, 7 *Wen.* 181; *Grant v. Fancher*, 5 *Cow.* 309; *Todd v. Birdsall*, 1 *Cow.* 260; *Williams v. Keech*, 4 *Hill*, 168.)

The general powers and duties of the trustees of school districts are defined and provided by 1 *R. S.* 481, § 75, and by subsequent statutes embodied in 1 *R. S.*, 3 ed., p. 538.

A school district in this State, although a *quasi* corporation, can neither sue or be sued in its corporate name. Our statute provides that it shall be represented by its trustees, who have power to sue in its behalf, and are subject to be sued on its account. No private action, unless given by statute, lies against such corporations for a breach of corporate duty. (*Russell v. The Men of Devon*, 2 *Term R.* 667.) Having no corporate fund, each inhabitant would be liable to satisfy the judgment. The common law does not impose this burden; though a state may. But the supreme court of Massachusetts, in the case of the *Inhabitants of the Fourth District School of Rumford v. Wood*, (13 *Mass.* 192,) expressly decided that the inhabitants of school districts might be considered, under their institution, as *quasi*

corporations, and might sue as a corporation by its corporate name.

The only interest which it is pretended Adsit or Sprague had to be affected by the result of the suit, was, that the question to be decided involved an increase or diminution of the funds of the district, so as to add to, or lighten the burden of taxation upon them as individual members of the school district or corporation. It is well settled, that a mere liability to be rated or taxed constitutes an interest too remote and contingent to operate as the ground of exclusion. (*King v. Proper*, 4 Term Rep. 17; *Falls v. Bellknapp*, *supra*, 1 Johns. 486; *Bloodgood v. Jamaica*, *supra*, 12 John. R. 285; *The City Council v. King*, 4 McCord, 487; *Smith v. Barber*, 1 Root, 207; *Hunter v. The Trustees of Sandy Hill*, 6 Hill, 407; *The village of Watertown v. Cowen*, 4 Paige, 510; *Cow. & Hill's notes*, p. 92, 125, 126, 1541; *Eustis v. Parker*, 1 N. Hamp. Rep. 273.

The rule seemed to be well settled in many of our sister states, that a corporation of a state, county, town, village, school district, or other corporation formed for municipal purposes, is a competent witness, in behalf of his corporation, in respect to corporate claims, or liabilities of all kinds, if he have no personal interest beyond that of a corporator. (*Methodist Epis. Ch. of Cincinnati v. Wood*, 5 Harn, 583; *Mayor, &c., v. Wright*, 2 Porter, 235; *State v. Davidson*, 1 Bailey's S. C. Rep. 35; *Cox v. Way*, 3 Blackf. 143; *Fuller v. Hampton*, 5 Conn. R. 416.)

The general result of the cases is expressed by the supreme court of Ohio, in the case above referred to, as follows:—"In cases where corporations of a *public nature*, comprehending the divisions of the state, or institutions for charitable or pious purposes, such as counties, towns, school districts, religious or charitable societies, are parties to the record, or interested, the members of the corporation, having no individual interest, are competent witnesses."

But, in the decision of the case at bar, it is not necessary to go that length. The individuals who were rejected as witnesses in this case, were in no sense parties to the record, and therefore

could not be directly affected by the result, either as individuals or as corporators. I am of opinion that there is no error in the judgment of the supreme court, and that it should be affirmed.

JOHNSON, J.—The counsel for the defendants is mistaken in supposing that the justice had no jurisdiction in this case, or that the action was barred by the decision of the county superintendent. Trustees of school districts are liable to be sued upon contracts made by themselves and their predecessors in office. (*Williams v. Keech*, 4 *Hill*, 168; *Silver v. Cummings*, 7 *Wen.*, 181; 2 *R. S.* 473-4, *secs.* 92-96.)

It is provided by 1 *R. S.*, 487, *sec.* 124, that “any person conceiving himself aggrieved in consequence of any decision made,” amongst other things, “by the trustees of any school district, in paying any teacher, or refusing to pay him, or refusing to admit any scholar gratuitously into any school, or concerning any other matter under this title, may appeal to the superintendent of common schools, whose decision thereon shall be final.” By a subsequent enactment, (*Sess. Laws.* 1843, *chap.* 133, *sec.* 7,) it is provided that all such appeals shall be made in the first instance to the deputy superintendent of the county, whose decision shall be final, unless appealed from to the superintendent, within fifteen days. Under these provisions, trustees may appeal whenever any decision is made against their district by other officers; but they cannot appeal from their own. It is only the party aggrieved by the decision who is authorized to appeal. It may be that if the plaintiff—who, if any one, was the aggrieved party in this case—had seen proper to appeal to the deputy superintendent, and thus submit himself to his jurisdiction, his decision would have been final unless appealed from: provided notice had been given to the other parties, so as to give them an opportunity of being heard; but not otherwise. He was not, however, bound to appeal, as the statute has not taken away the jurisdiction of courts of law in such cases. (*Crittenden v. Wilson*, 5 *Conn.* 165; *Malcom v. Rogers*, *id.* 188.)

But the justice erred in rejecting the witnesses offered by the

Reynolds *agt.* Mynard and others.

defendants, Sprague and Adsit. They were inhabitants of the district, and neither had paid his proportion of the teachers' wages. Unless, therefore, there were public moneys applicable to that purpose sufficient to pay the teachers, or they had been exempted as poor persons, both were liable to have their proportion of such wages collected from them by a rate bill, and warrants issued by the trustees. But as it was not shown how this was, it did not certainly appear that either would be liable in any event. Had their liability for teachers' wages, however, been made clearly to appear, they were still competent witnesses, as the objection only went to their credibility.

It is insisted by the plaintiff's counsel, that a person liable for teachers' wages, stands in a different situation from an inhabitant of a school district, liable to be taxed for building or repairing a school-house, or for other general tax levied upon the taxable inhabitants of the whole district; and that the interest of the former is more direct and certain than that of the latter. But I can perceive no difference in principle. In the one case, he is taxed because he has sent to school, and in the other, because he owns taxable property in the district; and it is perfectly immaterial whether reference is had to the teachers' list, or to the assesment roll, to ascertain what proportion of the whole amount he is to pay. The reason why neither should be excluded in a suit between trustees and third persons, is that neither of them has any immediate and direct interest in the verdict or judgment to be rendered. It could not be given in evidence in their favor, nor against them, in any subsequent suit. It cannot be necessary to cite authorities in support of a principle so well settled. Judgment of the supreme court affirmed.

DECISION—*judgment affirmed, unanimously.*

NOTE.—JEWETT, C. J., *held*, that the only interest which it was pretended Adsit or Sprague had, to be affected by the result of the suit, was, that the question to be decided involved an increase or diminution of the funds of the district, so as to add to or lighten the burden of taxation upon them as individual members of the school district or corporation. It was well settled, that a mere lia-

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bility to be rated or taxed, constitutes an interest too remote and contingent to operate as the ground of exclusion.

These individuals were in no sense parties to the record, and therefore could not be affected by the result, either as individuals or corporators.

JOHNSON, J., *held*, that the justice had jurisdiction in the case. That the decision of the deputy superintendent did not bar the action. That the plaintiff was the aggrieved party, who only could appeal; and that he was not bound to appeal, as the statute had not taken away the jurisdiction of courts of law in such cases.

Also *held*, that if the case had clearly shown (which it did not) the liability of Adsit and Sprague for the teachers' wages, they were still competent witnesses, as the objection only went to their *credibility*. They had no immediate and direct interest in the judgment rendered. It could not be given in evidence in their favor, nor against them in any subsequent suit.

Not reported.



ROWLAND, plaintiff in error, *agt.* FULLER, defendant in error.

Questions discussed.

1. The only question in this case was, whether the plaintiff's *declaration* was bad in *substance*, as well as in form?

THE declaration is as follows .

Madison County, ss : John Rowland, plaintiff in this suit, by N. King, jr., his attorney, complains of George K. Fuller, defendant in this suit, of a plea of trespass, *not* for breaking the plaintiff's close, but conformed and adapted to the circumstances and case of the wrongs hereinafter set forth, pursuant to the statute in such case made and provided, by filing and serving this declaration according to statute. For this, that the said plaintiff, on the first day of June, in the year of our Lord, eighteen hundred and forty-three, and thence onward, continually to the day of the commencement of this suit, was seized in fee simple of a lot of land, and two houses and a cistern on the same, situate in the town of Sullivan, in the county aforesaid, and within the jurisdiction of this court, lying on the

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north side of the public highway which runs easterly and westerly, which has been called the north branch of the Seneca turnpike road, in the village of Chittenango, in the said town of Sullivan, in the county aforesaid, which lot of land fronted and lay adjoining in its width of four rods to the said highway, and was bounded on its easterly side, then or formerly, by the lot of one Newman Ware ; the said plaintiff then having one Daniel T. Hurd, and one Christopher De Witt, for his tenants in the possession of the said premises, and while the said plaintiff was so seized of his lot aforesaid ; the said defendant, on the day and year aforesaid, and on divers other days and times between that day and the day of the commencement of this suit, wilfully and wrongfully dug up, plowed up, and subverted the soil and land of the said plaintiff, lying open in the said highway, directly opposite, and without the front line of his lot aforesaid and adjoining that lot ; and also in like manner dug up his soil and land, being the plaintiff's door-yard, of the length of four rods, and width of twelve feet, lying within that front line, and between the same and the plaintiff's said houses on his said lot ; which lot, in width four rods, extended back from the said highway, or road, twelve rods in depth ; and the said defendant also wilfully and wrongfully undermined, dug out, took up, and carried away the door-yard fence of the said plaintiff, there found of great value, to wit, five hundred dollars ; and took and carried away the earth and gravel from the whole surface of the said door-yard, and to great depth, to wit, two feet ; and also removed the sod and gravel from the cistern aforesaid of the said plaintiff, and from the underpinning of the said plaintiff's houses aforesaid, and took and carried away the earth and gravel, and also all the earth, soil and gravel, so as aforesaid dug up and subverted, to wit, five hundred wagon loads of soil, earth and gravel of great value, to wit, other five hundred dollars ; and also injured, stopped up, and impeded the drain of the plaintiff's cellar there being, whereby, and in consequence whereof, the said underpinning of said plaintiff's houses, and plaintiff's said cellar and cistern were greatly undermined, exposed and injured. and the plaintiff's said houses

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and door-yard, and cistern and cellar, and the whole of said plaintiff's lot and buildings thereon were greatly depreciated in value, and the said plaintiff lost the advantage of renting the same as theretofore, and other injuries to the said plaintiff, the said defendant, then and there did, to the damage of the said plaintiff of five hundred dollars; and therefore he brings suit, &c.

And now at this day, to wit, on the first Monday of May, in this same term of May, until which day the said defendant had leave to imparle to the said bill of the said plaintiff, and then to answer thereto, &c., before the justices aforesaid, of the court aforesaid, at the City Hall, in the city of New-York, comes the plaintiff aforesaid, by his attorney aforesaid.

And said defendant, by John G. Stower, his attorney, then comes and defends the wrong and injury, when, &c., and says that the said amended declaration of the said plaintiff, and the matters therein contained in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against him the said defendant, and he specifies the following causes of demurrer :

1. That the said amended declaration expressly professes in its commencement to be in trespass, conformed and adapted to the circumstances and case thereafter set forth, pursuant to the statute in such case made and provided; when in fact, no statute exists which allows the action of trespass to be brought under the circumstances, and in the form set forth in said declaration; and so the same lacks due technicality, is uncertain, defective, repugnant and informal.

2. That the said declaration expressly alleges the plea therein contained to be in trespass, and yet refers to a statute, and alleges that the action is brought pursuant to it, which statute allows trespass on the case and not trespass to be brought in certain cases, where, before such statute, trespass was the only legal remedy; and so is contradictory, repugnant in itself, uncertain and informal.

3. That the said declaration alleges the action not to be

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brought for breaking the plaintiff's close, and yet alleges acts of the defendant, expressly showing and charging that he did break the close of the plaintiff, described in the said declaration as a lot of land, &c.; and so the said declaration is uncertain, contradictory, repugnant to itself, defective and informal.

4. That the said declaration, both in the description of the character of its plea, and in the form of the commencement of the description of the grievances therein set forth, purports to be in trespass; whereas the alleged supposed injuries therein set forth, and of which the plaintiff complains, are indirect and consequential, and the subject of an action on the case; and also that it is not in said declaration alleged that the said grievances, or trespasses, were committed with force and arms, and against the peace, &c.; and so the said declaration is uncertain, repugnant, and contradictory to itself and informal.

5. That the commencement of the said declaration is in trespass, and the allegations of the perpetration of the said supposed grievances in the declaration, and the termination thereof, are in case; and so the said declaration is uncertain, repugnant to itself, and informal.

6. That the said declaration improperly comprehends and includes therein pretended causes of action different in their nature, to wit: a pretended cause of action founded on a supposed digging up, plowing up, and subverting the soil and land of the plaintiff, lying open in the highway directly opposite and without the front line of the lot described in the said declaration as belonging to the said plaintiff; and also another pretended cause of action for digging up his soil and land, being the plaintiff's door-yard, of the length of four rods, and width of twelve feet, lying within the front line of the plaintiff's lot, between the same and the plaintiff's house on the said lot, which lot extends back from the highway twelve rods in depth; and also for undermining, digging out, and taking up and carrying away the earth, soil and gravel, from the whole surface of the said door-yard, which causes of action are incompatible with each other, and ought not to be joined in the said decla-

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ration ; and also that causes of action founded on wilful and determined wrongs and injuries attended with immediate damage, ought not to be, and cannot be blended in the same declaration with causes of action founded upon consequential wrongs and injury ; and, in this respect, the said declaration seeks to recover upon a misjoinder of causes of action.

7. That the said declaration is contradictory and repugnant in its commencement, to the statement of alleged grievances in the body thereof, and in its close—the commencement being in trespass, and the statement of the alleged causes of action, and close in trespass on the case.

8. That the said declaration shows no cause of action in a plea of trespass against the said defendant.

9. That the said declaration shows no cause of action against the said defendant.

10. That the said declaration contains the following surplus, prolix and unmeaning words : “and within the jurisdiction of this court.” And this he, the said defendant, is ready to verify, &c.

The plaintiff put in a joinder in demurrer. The supreme court, in July term, 1844, rendered judgment for defendant on the demurrer. The plaintiff brought a writ of error, and removed the judgment into the court of errors, which became transferred to this court.

N. King, jr., attorney, and

Nathaniel King, counsel for plaintiff in error.

First. The declaration is good ; (5 *Hill*, 176, 177.)

Second. The ten causes of demurrer are groundless : because the 1st, 2d, 3d, 4th, 5th, 7th, 8th and 9th, turn continually on the plea, or supposed *misnaming* of the action, “ of which advantage cannot be taken, even on special demurrer,” (*Graham’s Pr.*, 2d ed. 202 ;) and “ the name of the action is *surplussage*,” (5 *Hill*, 177 ;) the 6th is groundless, because wrongs done to Rowland’s land, in the highway and in his door-yard, may be joined ; and the 10th is confessed frivolous by the defendant.

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(1 *R. S.* 749 ; 6 *Bac. Ab.* 566, 567 ; 1 *Johns.* 511 ; 3 *Johns.* 468 ; 2 *R. S.* 356, § 28 ; 9 *Johns.* 62 ; 2 *R. S.* 352, §§ 4 & 5 ; 3 *Bl. Com.* 122 ; 3 *Wooderson*, 193, 194.

☞ This is not *trespass*, but *case*. ☞

John G. Stower, attorney, and

Henry Fuller, counsel for defendant in error.

The demurrer to the declaration in the court below was well taken ; because,

First. If the declaration is deemed to be in trespass, it is bad for the reasons :

1. It is bad upon *general* demurrer, because trespass cannot be maintained by the plaintiff, a landlord, while his tenants are in possession ; his remedy is by an action on the case for the injury done to his reversionary interest. (1 *Chit. Pl., Springfield ed.*, 202, 204, 206 ; 1 *John. Rep.*, 512 ; 3 *John. Rep.*, 468 ; 9 *John. Rep.* 62, *text and note(a)*).

2. It is bad upon *special* demurrer, for the want of the “*viet armis*” and “*contra pacem*” clauses. (1 *Chitty's Pl., same ed., text and notes (a) to (h) and (2.)*)

Second. The declaration is not good under the statute giving *trespass on the case* in certain cases, where before *trespass* was the proper remedy. (2 *Rev. Stat., old ed.*, 553, § 16 ; *new ed. vol. 2*, 456.) That statute gives trespass on the case in its technical form, and not in that of the anomalous pleading, neither trespass, or trespass on the case, here presented to the court. If the pleader did design the declaration to have been drawn in conformity to the statute, it should have been in the usual form of trespass on the case.

It is not in trespass on the case for the reasons :

1. The pleader expressly declares, in the commencement of his declaration, that he complains of the defendant “of a plea of trespass.” (1 *Hill's Rep.* 71.)

2. In his statement of injuries, the declaration begins with “For this that,” which is only proper in trespass. (1 *Chit.*

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Pl. 422, *same ed.*, *text and notes (x) and (1, 2.)* 7 *Cranch's Rep.* 158; 3 *Hen. & Mun.* 271; 7 *John. Rep.* 109.)

As to the form of the commencement in case, (*see* 2 *Chitty, same ed.*, 596; *same*, 769, *bottom of page.*)

3. The allegation that the acts complained of were done "wilfully and wrongfully," clearly characterizes the action as *trespass*, and not *trespass on the case*. (1 *Chit. Pl.* 226, *text and note (s.)* 6 *Term Rep.* 125; 8 *Term Rep.* 188; 1 *Chit. Pl.* 109, 110; *same*, 226, *note (g)*; 7 *John. Rep.* 109.)

Third. This is not a case within the mischief the statute was designed to remedy, by allowing case to be brought—the injury being alleged to have been *wilfully* committed, and the statute having been designed to meet cases where the form of the action was doubtful. (2 *Rev. Stat.*, *old ed.*, 553; *new ed.*, 456; *Reviser's notes*, 3 *Rev. Stat.*, *new ed.* 778.)

Fourth. Nor does that statute apply to injuries to *real estate*; its operation is confined to wrongs inflicted upon *persons* and *personal property* only. (*See references to the 3d point.*)

Fifth. But to whatever class of actions the declaration may belong, it is substantially inconsistent and repugnant to itself, and bad; because,

1. In its commencement, it professes *not* to assert a right of action for breaking the close of the plaintiff, and in the body of it sets up one founded upon such breaking alone.

2. In its commencement, it states the action to be "of a plea of *trespass*," and prefaces the statement of the injuries complained of, with the distinctive phrase in that form of action, "for this that," and then asserts them to have been *wilfully* committed; and in the other portions of it, and in the close, it omits all allegations of force, and sets forth a state of facts under which *trespass* does not lie.

3. The declaration alleges the injury to have been willful, and the form of action to be *trespass*, and yet closes in case. It is good cause of demurrer, that its close does not conform to its commencement.

4. The declaration professes to be in *trespass* conformed, &c., pursuant to the statute, &c., when no statute exists which al-

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lows trespass to be brought under the circumstances, and in the form set forth in this declaration. The statute alluded to gives *trespass on the case*, not *trespass*. (1 *Chitty's Pl.*, Springfield ed., 264, 266 ; 5 *Com. Dig.* 338, *Title Pleader*, ch. 23, as to *repugnance*.)

Sixth. The declaration shows no good and legally expressed cause of action against the defendant:

Seventh. The judgment of the supreme court should be affirmed.

☞ 2 *Humph. Pre.* 746 ; 1 *M. & S.* 234 ; 8 *Pick.* 235. ☞

BRONSON, J. Whether the pleader intended to get the start of all the reformers of the day, may be a doubtful question ; but he has evidently been at some pains to keep clear of legal precedents, and has framed the declaration after the pattern of the earth at the time when it was "without form and void." It will not be necessary, however, to look at any question of mere form, for the declaration is bad in substance.

The pleader has called this an action of trespass, and it certainly comes nearer to that than it does to anything else ; and then the difficulty is, that as the premises are in the occupation of tenants, and the plaintiff has no possession in fact, he cannot maintain the common law action of trespass.

If this can be regarded as an action on the case, the declaration will still be bad ; because it alleges an injury to the property generally, and neither limits the complaint to an injury done to the plaintiff's *reversionary estate and interest* in the property, nor avers that there was any injury to that *estate or interest*. All the precedents are against the pleader, (8 *Went. Plead.* 587 ; 2 *Chit. Plead.* 777, ed. of 1837 ; 2 *Humph. Pre.* 746.) In *Jackson v. Pesked*, (1 *M. & S.* 234,) judgment was arrested after verdict, for the want of an averment that the plaintiff was injured in his reversionary estate and interest in the premises.

*This is something more than a nice point in pleading. The tenants are entitled to damages for the disturbance in the present enjoyment of the property ; and the landlord is only entitled to damages for such injury as may have been done to the

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reversion. The averment in question should be made not only for the purpose of stating truly the case on which the party claims to recover, but also for the purpose of limiting the recovery to the proper amount of damages. In *Jackson v. Pesked*, no doubt was entertained but that the declaration would have been bad on demurrer; and the question was whether, after verdict, the court could not infer that the plaintiff was confined at the trial to the proof of such an injury as would be prejudicial to the reversion, and that all evidence short of that effect had been excluded. The court did not find itself able to make that inference. After examining the cases, lord ELLENBOROUGH said, there was no authority upon which they would be warranted in presuming that the jury were confined to such injuries as would necessarily prejudice the reversion, as the charge in the declaration was conceived in such terms as to include injuries which were not necessarily prejudicial to it, but more aptly and naturally applied to injuries to the possession only. He added, that as the plaintiff had not charged that the reversion was prejudiced, or that the plaintiff was damnified in respect thereof, the court was not warranted in inferring that such a prejudice, out of the natural and ordinary scope of the allegation, must have been proved. All this is applicable to the case in hand.

It is possible, and perhaps probable, that some of the acts complained of would injure the plaintiff's reversionary interest in the property. But that is more than we can certainly know; and it is not a matter which should have been left to inference. There should have been a direct averment. And, besides, if we could see that all of the acts must have been proved prejudicial, in some degree, to the reversioner, we can see still more clearly that they must also have been injurious to the tenants; and then, as the plaintiff has not restricted himself to a claim as reversioner, he may recover, upon the declaration as it now stands, not only his own damages, but the damages which have been done, and which belong to the tenants.

If the plaintiff had sued on the statute which gives an action of trespass to a reversioner for an injury done to the inherit-

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ance, (1 R. S. 750, § 8,) the declaration would be insufficient, because it neither avers that an injury has been done to the inheritance, nor limits the claim to damages for such an injury. What has been said under the last head, is equally applicable here.

In going beyond the authorities, and showing that they are right in principle, it must not be understood that I think such a course at all necessary. If this were no more than a question of form, I should feel bound by the law as I find it, without regard to my own notions of what it ought to be. Reforming and amending the laws is a work which belongs to the legislature, and not to the courts. However it may be with others, I am bound by established precedents. When the new code of procedure comes into operation, I shall follow it as well as I know how. But, until then, I shall follow the law as it is, without regard to the fashion or temper of the times.

I am of opinion that the judgment of the supreme court is right, and should be affirmed.

DECISION—*Judgment affirmed. For affirmance*—BRONSON, JONES, RUGGLES and GRAY. *For reversal*—JEWETT, GARDINER, WRIGHT and JOHNSON.

NOTE.—BRONSON, J., *held* that the declaration was bad in *substance*, as well as in form. If the action was called *trespass*, the plaintiff had not the possession in fact, and could not maintain the common law action of *trespass*.

If it was called an action on the *case*, it was bad because it alleges an injury to the property generally, not limiting to an injury done to plaintiff's reversionary estate and interest in the property, nor avers that there was any injury to that estate or interest.

Not reported.

 Mattison *agt.* Baucus.

MATTISON, plaintiff in error, *agt.* BAUCUS, defendant in error.

Questions discussed.

1. Whether, in an action of *trover*, brought by a constable, against a defendant who claimed to take the property by virtue of an attachment and levy, the constable could recover the full value of the property, or only the amount of the execution in his hands, and interest thereon?

2. Whether, in an action of *trover*, by a constable, claiming the property by virtue of a judgment, execution, and levy, the defendant could question the validity or regularity of the judgment and execution before showing some right to the property in question?

3. Whether proof of what plaintiff said when he made the levy—having been called as a witness to prove the loss of the execution delivered to him—was properly admitted?

4. Where the plaintiff, to prove a conversion, showed that the defendant directed one Allen to sell the goods—whether the defendant should have been permitted to show, in the same conversation, he said that the goods had been seized by an attachment in his favor, under which he had obtained judgment and execution?

5. Where a chattel mortgage, containing a condition that the mortgagor should at all times permit the mortgagee, his executors, &c., to have and possess, occupy and enjoy the property mortgaged, upon demand by him or them—whether, where the mortgagee having possession of the property under the mortgage, the debt secured thereby not being due, the mortgagor has such an interest in the equity of redemption as can be sold on execution?

THIS was an action of *trover*, originating in a justice's court. The plaintiff in error was a constable, and claimed to have a special property in the goods converted by the defendant in error, by virtue of a levy made by him as such constable on an execution in favor of *Lewis Buffit v. John Foster*.

The plaintiff in error, as such constable, (and by virtue of his levy claiming the goods,) brought this suit against the defendant, and the same was tried before *Levi Nelson, Esq.*, justice of the peace, on the 27th day of September, 1839. The plaintiff then recovered the full value of the goods, *viz.* :—

Damages,	\$41.83
Costs,	2.98
	<hr/>
	\$44.81

Mattison *agt.* Baucus.

The defendant appealed to the court of common pleas of Rensselaer county.

On the trial of the cause in the court of common pleas, the plaintiff proved, by *Levi Nelson*, the justice before whom the cause was originally tried, that on the 8th day of July, 1839, he entered a judgment in favor of Lewis Buffitt, against John Foster, for \$19.63 damages, and \$1.03 costs. That the suit was commenced by summons; that Foster appeared by attorney; that the same day he rendered judgment and issued an execution, and delivered the same to Reuben Mattison, the constable and plaintiff, on the oath of Lewis Buffitt, the plaintiff in said judgment.

The counsel for the defendant offered to prove by the said justice, that the plaintiff in the execution swore to no facts or circumstances required by statute to entitle him to have execution till thirty days after judgment. The court overruled the offer, and defendant's counsel excepted.

The justice then testified that his docket did not show when the summons was issued; that it did not show that the attorney who appeared for Foster had any authority to appear; that the justice did not swear the person appearing as attorney, as to his authority to appear; nor did the justice know that Buffitt, the plaintiff in the execution, consented to the appearance in behalf of defendant.

But the court decided that the defendant could not question the validity of the judgment, until he showed a right to the property in question: and the defendant's counsel excepted.

Plaintiff then proved, by *Zachariah Lyon*, that plaintiff, in July, 1839, called at his house; said he had an execution in favor of *Buffitt v. Foster*.

The declaration of the plaintiff was objected to, and the objection overruled, and the defendant's counsel excepted.

Witness then testified that plaintiff then came there and inquired if witness had any of Foster's property, and that he, plaintiff, claimed to levy by virtue of an execution in favor of Buffitt. I pointed out to him the property, (describing certain household furniture.) George B. Allen, a constable of Lan-

singburgh, afterwards took that property away from his house, and witness thinks defendant was with him. Allen afterwards sold it.

Witness further testified that Allen, the Lansingburgh constable, attached the property before the plaintiff came to his house to levy. Part of the property was at his house, and part at Foster's house, when Allen attached it.

The property was all levied upon by Allen and receipted by witness before the plaintiff came to make a levy; witness had a mortgage on all the property, given by Foster (the defendant in the execution,) before the same was taken by either of the constables; witness was in the act of removing it to his house, (Foster having absconded,) before Allen came to my house; I had some of the property at my house before Foster went away; Allen assisted my boy in bringing the remainder of the articles, and all were at witness's house before plaintiff came there to make a levy.

Witness further testified, that after the suit was commenced, and about the time it was first brought to trial in the court of common pleas, he sold and assigned his mortgage to Buffitt, the plaintiff in the execution against Foster, (the execution under which plaintiff claims by virtue of his levy.)

Lemuel S. Finch proves that Allen, the Lansingburgh constable, (who had first levied upon the property under attachment,) sold it; that defendant directed him to sell.

The defendant offered to prove, that at the time he so directed Allen to sell, he said, at the same time the goods had been seized by an attachment in his favor under which he had obtained a judgment and execution—

Plaintiff objected to this evidence, and the court sustained the objection, and defendant excepted.

The mortgage from John Foster to Zachariah Lyon (of the property in question) was then read in evidence, and the assignment thereof from Lyon to Buffitt, the plaintiff in the execution. Mortgage dated the 11th June, 1839.

The mortgage was given to secure the sum of \$48.16, payable in six months, and contained a clause which allowed the

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mortgagee, his executors, &c., upon demand, to have and possess, occupy and enjoy, the property mortgaged.

The assignment to Buffitt, dated 25th January, 1840, (long after the judgment rendered before the justice.)

Zachariah Lyon further testified, that the mortgage was given for a *bona fide* debt, and remained wholly due and unpaid at the time he assigned to Buffitt.

The defendant's counsel in the court of common pleas then moved for a non-suit upon the following grounds:—

1. That it appearing, from the plaintiff's own evidence, that the property was seized by an attachment previous to the pretended levy of plaintiff, it was incumbent upon him to show the attachment was void.

2. That the property in question was mortgaged to *Zachariah Lyon*, and claimed by him, or in his behalf, under the mortgage at the time of the sale, and that no other claim than that under the mortgage was interposed.

3. That no conversion by defendant was proved.

4. That the plaintiff never acquired any possession by his pretended levy, so as to enable him to sustain trespass or trover. The actual and legal possession was in Doctor Lyon, under a mortgage from Foster; the validity of that mortgage cannot be questioned by the plaintiff, who at most could have but a special property, subject to the direction of Buffitt, the plaintiff in execution, by virtue of a levy under which the plaintiff brings this suit. Buffitt, by taking an assignment after this suit was brought, admits the validity of the mortgage—admits the legal title and possession in Doctor Lyon.

The court of common pleas overruled the motion for a non-suit, and decided that a levy and conversion had been proved—that inasmuch as Buffitt had obtained an assignment of the mortgage, which he had a right to do, to quiet his title without claiming under it, and as there was no other legal claim to the property, the plaintiff acquired a special property that enabled him to sustain this action, if Buffitt was disposed not to enforce his mortgage.

To this decision the defendant's counsel excepted.

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The defendant's counsel then insisted that as the plaintiff, under the ruling of the court, had only a special property by virtue of his levy, he was entitled to recover no more than the amount of the execution in his hands, and interest thereon. But the court decided that the plaintiff was entitled to recover the full value of the property sold by Allen's directions, with interest thereon from the day of sale. To which decision of the court the defendant's counsel excepted.

The court of common pleas then directed the jury to find a verdict for the plaintiff for \$56.47, the value of the property sold, and interest from the day of sale; for which amount the jury found.

The defendant's counsel excepted to the said direction of the jury by the court.

The defendant prosecuted a writ of error to the supreme court, and the judgment of the court of common pleas was reversed.

The opinion of the supreme court was as follows:—

BEARDSLEY, Justice. The court erred in deciding that the plaintiff was entitled to recover the full value of the property. (*Spoor v. Holland*, 8 *Wend.* 445.) There are various other points made in the case; but, without passing upon them, the judgment must be reversed, on the ground that the court erred upon the question of damage.

The plaintiff prosecuted his writ of error, to reverse the decision of the supreme court, in the court for the correction of errors. The cause was in readiness for hearing before the court of errors was abolished, and now comes before the court of appeals.

The cause was submitted upon printed points and arguments.

T. C. Ripley, attorney and counsel for plaintiff in error.

It is insisted that the supreme court erred in the application of the authority (*Spoor v. Holland*, 8 *Wend.* 445) to this

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case, and that its judgment was erroneous for the following reasons:—

First. The constable is liable to the defendant in the execution for all the property he takes, and should therefore recover the whole amount of the *wrong-doer*. (See *Russell v. Butterfield*, 21 *Wend.* 303, *from the middle of the page to the bottom*; also reporter's last note to the same case.) The rule established in that case is sustained by principle and authority; and the case of *Spoor v. Holland*, referred to in the supreme court, is perfectly consistent with it.

In that case, Holland was the owner of the property after the executions were satisfied. The defendants in the execution sold the property in the brick to one Parsons, and Parsons sold to Holland, against whom the constable brought the suit. If these transfers were void as to judgment creditors, they were valid between the parties. The defendant, Holland, was entitled to the brick, as against *Freeman & Gurney*, the defendants in the original executions; and it follows, as against him, (Holland,) the special property man could only recover the value of his special property; Holland then being the general owner.

This comes within the rule (21 *Wend.* 300) laid down in these words: "In *trover* or *trespass*, if the property be taken by a *stranger*, the special property man may recover the whole value, holding the balance, beyond his own interest, in trust for the general owner; but if the suit be against the latter, he is entitled to a deduction of the value of his interest."

In *Spoor v. Holland*, the court decided that the general owner was entitled to a deduction of the value of his interest, which was right. In this present case, the supreme court decided that, as against a *stranger* and a *wrong-doer*, the special property man could recover only the amount of his interest; which we hold is against reason, principle, and authority, and a manifest misapprehension of the principle decided in *Spoor v. Holland*.

Second. The first point disposes of the case, as sent here by the supreme court; and, so far as correcting the decisions of

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that court is concerned, the decision of that point covers all the supreme court decided. (*See Error Book*, p. 22.)

Should this court decide to review points not decided by the supreme court, the following are presented by the *Error Book*.

Third. The first exception was to a decision in the court below, that the defendant here could not show that Buffitt did not swear to any facts to obtain the execution against Foster. (*See Error Book*, p. 11.)

This decision was correct,—

1st. Because the defendant below had shown no right to the property, was not a party to the judgment, nor did he offer to connect himself with any outstanding title. (*Duncan v. Spier*, 11 *Wend.* 54; *Daniels v. Ball*, *id.* 57.) As against him, the execution alone was sufficient. (*Holland v. Spoor*, 8 *Wend.* 445, and cases there cited.)

2d. If the execution was irregularly issued, the defendant in the execution alone can avail himself of the irregularity. (2 *Hill*, 364; *Graham's Pr.*, 2d ed., 364, and cases there cited.)

3d. It nowhere appears in the case that Foster was either a freeholder, or an inhabitant of the county, having a family; and consequently an execution might issue without oath. (*See 2 R. S.* 2d ed. 178, § 133.)

4th. Foster, having absconded, was of course a non-resident. (*See Error Book*, p. 13.)

5th. The execution alone was sufficient as against a wrongdoer. (*Spoor v. Holland*, 8 *Wend.* 445.)

Fourth. The next is, that the proof does not show a valid judgment, coupled with the remark, that the defendant could not question the validity of the judgment till he showed some right to the property in question. (*See Error Book*, p. 12.)

This decision upon the point raised by the counsel for the defendant, was correct.

The plaintiff had shown himself possessed of an execution issued by a justice of the peace on a judgment rendered after a personal service of a summons, and an appearance of the defendant, Foster, by an attorney. The defendant's counsel in

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this cause claims that the judgment was *void*, because the justice did not take proof of the authority of the defendant's attorney. In answer, we say that the plaintiff, Buffitt, did not object, which is equivalent to admitting. (*Ackerman v. Finch*, 15 *Wend.* 652.)

The statute being for his benefit, he had a right to waive it.

The personal service of the summons alone gave the justice jurisdiction. (*Bromley v. Smith*, 2 *Hill*, 517.)

Under this state of facts, the court were undoubtedly right in saying this defendant, Baucus, could not attack that judgment collaterally, without showing some right to the property in question. The remark of the court was intended to limit their decision so far as to allow the defendant, on proving title to the property, to show that the judgment might then be attacked, on the ground that it was rendered by collusion, in fraud of the rights of other persons.

The decision went the length that a judgment was proved binding between the parties, and that third persons could not question its validity, unless they had an interest in the property affected by it.

No other objection to the sufficiency of the proof was taken, and consequently the pleadings are not inserted in the bill of exceptions.

Fifth. The next exception is to a decision that the loss of the execution was sufficiently proved. (*See Error Book*, 12.)

The plaintiff below swears positively to the loss of the execution; but, on cross-examination, he stated some facts from which he suspected the defendant, Baucus, had stolen it. But the court very properly held, there was no sufficient ground for the suspicion, and we insist that a party is not entitled to notice to produce a paper feloniously obtained, unless he admits that he has possession of it.

2d. If he had such possession, he knew that it was the foundation of our right to recover, and was bound to produce it without notice. (1 *Phil. Ev.*, by *Cow. & Hill*, 442.)

Sixth. The next exception is to the decision admitting

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proof of what the plaintiff, Mattison, said, when he made the levy. (*See Error Book, p. 12.*)

This was a part of the *res gestæ*, and was clearly admissible. Declarations accompanying acts are the strongest evidence to show intention; and, when proved by a third person, are better evidence than the naked return of the party on the back of an execution.

The execution in this case being lost, it became necessary to prove a levy by parol; and the acts and declarations of the constable are both essential to show the intent with which the plaintiff seized the property, in lieu of the usual endorsement of levy upon the execution.

Seventh. The next exception was to a decision against an offer on the part of the defendant to prove that he, when he directed Allen to sell the property in question, further said the goods had been seized by an attachment in his favor, under which he had obtained a judgment and execution. (*See Error Book, p. 14.*)

1st. This was objected to on the ground that an attachment, judgment, and execution, could not be proved by parol.

2d. That the direction proved was not the admission of a fact, but a *fact itself*, and it was no more competent for him to prove his sayings as a justification for that act, than if he had sold the property himself, instead of directing another to sell it. And I think no one will pretend, that if he had sold the articles himself instead of directing another to do it, that his *saying* he sold by virtue of an execution, would dispense with the production of that process.

3d. That it did not tend to qualify the proof offered on the part of the plaintiff, but related to new matter which could not be proved by parol evidence. (*Gary v. Nicholas, 24 Wend. 351, 352; Summerset v. Adamson, 1 Bing. 73.*)

Under these objections, the evidence was properly excluded.

Eighth. The defendant asked for a nonsuit;

1st. That, as it appears by the evidence of the *plaintiff* that the property was seized by an attachment previous to the pre-

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tended levy of the plaintiff, it was incumbent on him to show that the attachment was void. (*See Error Book, p. 17.*)

This is not true in point of fact. The sole evidence on that subject was given by Dr. Lyon, in what purported to be a cross-examination, but was in fact an examination as to new matter by the defendant. (*See Error Book, p. 13.*)

1. It was not true that the *plaintiff* proved that the property was seized at all.

2. It was not true that there was proof that the property was seized by virtue of an attachment. The witness uses the terms attached and levied as synonymous terms, but does not state by what kind of a process Allen even claimed to levy.

This evidence was perhaps then proper as one link in a chain to make out a defence. It showed which constable had priority, in case both had legal process. And, had it been followed up by evidence of a valid attachment, regularly issued by a court of competent jurisdiction, against the property of *John Foster*, and proof that the defendant claimed under that title, it might have amounted to a defence. To hold that a constable is entitled to a man's property, without requiring him to show that he has legal process, would be a dangerous innovation, and I trust will not be adopted by this court.

Most clearly the plaintiff was not bound to prove a process void, when there was no evidence of its existence. It does not appear that any court had issued any process between any parties against any man's property, that had been used as a pretence for seizing the property in question. They require the plaintiff to prove that void, which was not proved to exist, and which in fact did not exist.

If John Foster had sued Allen in trespass, for taking this property, and proved the taking by Dr. Lyon in the words used in this case, there can be no doubt but he would be entitled to recover, unless the constable produced process in justification; and if this be so, surely Baucus cannot justify under Allen's title, without showing enough to justify Allen, especially as he does not connect himself with it, which would be necessary, if *Allen's* title was good.

There is no necessity for departing from the ordinary rule requiring a party to produce the best evidence in his power, which in this case is the process itself. If it ever existed, he can produce it or account for its absence. If it never did exist, (which was the case,) nobody suffers by requiring its production.

2d. Ground for non-suit sets up a mortgage in Dr. Lyon, and that no other claim was interposed at the time of sale.

As it no where appears that the plaintiff knew of the sale, he was not required to be there to set up his title.

The point has long been decided, that in this action the defendant cannot set up title in a third person without connecting himself with it. (*Duncan v. Spier*, 11 Wend. 54; *id.* 57, note.) It follows, therefore, that the Lyon mortgage is no defence for Baucus.

The property being liable to seizure, and being seized by virtue of the execution, the plaintiff, or the owner of the judgment, had a right, at any time, to get rid of any lien upon it; by showing it fraudulent, by paying it off, or by taking an assignment as a creditor having a junior lien; and having done so, it would be doing violence to every principle of justice to allow a wrong-doer, without claim of right, to use either of these titles to defeat the other.

The 3d ground for non-suit is, that no conversion is proved.

A conversion was proved. (*Error Book*, pp. 13, 14.)

The 4th ground for non-suit was in these words:—

“That the plaintiff never acquired any possession by his pretended levy, so as to enable him to maintain trespass or trover; the actual and legal possession was in Dr. Lyon, under a mortgage from Foster. The validity of that mortgage cannot be questioned by the plaintiff, who, at most, could have but a special property, subject to the direction of Buffitt, the plaintiff in execution, by virtue of a levy, under which the plaintiff brings this suit. Buffitt, by taking an assignment of that mortgage after suit brought, admits its validity—admits legal title and possession in Dr. Lyon—and cannot claim title under the assignment.”

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The main question raised in this point by the defendant's counsel is, What effect had the assignment to Buffitt by Dr. Lyon, upon the parties in this cause?

It strikes me that it has none whatever. The present plaintiff had levied upon the property, with Lyon's assent, as the property of John Foster—Lyon making no claim. (*Lyon's testimony, Error Book, pp. 12, 13.*)

Buffitt bought the mortgage for ten dollars. (*See assignment in Error Book, p. 16.*)

This assignment was taken to enable us to use Lyon as a witness to prove our levy, as the question whether he was an interested witness was embarrassing—we supposing that we were entitled to recover the whole value of the property, as against the defendant, a wrong-doer, and that the owner of the mortgage might be entitled to the surplus; after satisfying our execution, he then being the general owner, even if the mortgage was void as to judgment creditors; he therefore would be directly interested in swearing to increase the fund, as he would be entitled to the surplus.

We, therefore, took the assignment, not to strengthen our claim of title, or to weaken it, but to restore the competency of a witness; and we humbly insist that by doing so we made no admissions as to its validity against our levy: that the right of the constable was not diminished, and that whether said mortgage was void as against judgment creditors or not, was not properly in issue in this cause.

If it was properly in issue, and the question was tried, the evidence showed only that it was given for a *bona fide* debt; but did not show that it was not given to hinder and defraud other creditors, and therefore void: which the possession of Foster, after the mortgage was given, proves.

We insist that the court were right in overruling the motion for a non-suit.

There being no conflicting evidence, the court were right in saying a levy and conversion were proved; and also that we were entitled to recover the full value of the property under the circumstances; and, although the judge made some remarks

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about the mortgage that may not have been well considered, the above are all that he then decided; and we insist, that whether Buffitt was or was not disposed to enforce his mortgage, we were entitled to recover the full value of the property taken from us by a wrong-doer, holding the amount of our special property, and accounting to the general owner for the balance; and our recovery would bar the general owner.

Ninth. The direction of the court, that we were entitled to the value of the property, with interest from the day of sale, was correct.

1st. The value of the property has already been considered. Interest was properly allowable.

2d. If not technically correct, it was just and equitable, and the counsel for the defendant did not ask to have the question of interest submitted to the jury.

3d. No specific exception was taken to that part of the decision; and as the other part of the direction had been contested throughout, it was but fair for the court to suppose he meant to except to the measure of damages, and not particularly to the allowance of interest.

In reply to the argument submitted on the part of the defendant, it is only necessary to state, as to each and every of the pretended admissions and concessions, that they are not sustained by the Error Book—that they were not made on the trial of the cause—that they were never made by the plaintiff or his counsel in the common pleas or elsewhere—that they are not now made, and that they are imputed admissions, utterly without foundation, and originating in the mind of the counsel, and not in the facts of the case.

It is true that we then claimed, and now claim, that we showed a regular execution upon a valid judgment; and that we then insisted, as we now insist, that the defendant, who was a stranger and a wrong-doer, cannot question the regularity of the proceedings behind the face of the execution. That the defendant could not question our right to the possession of the property on which we levied, without connecting himself in some way with that property; and we having shown a regular

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judgment, *binding between the parties*, the court of common pleas were right in deciding that such a judgment could not be attacked collaterally by the defendant, without showing some right to the property claimed under it, in himself. He neither introduced, nor offered to introduce, any process to justify his conversion of the property, but claims a right to hold it without doing so.

The defendant's counsel insist that they were claiming the property under an attachment in their favor. The plaintiff's counsel have not admitted that any such process ever existed. No offer was made on the trial to prove the existence of such a process, or to justify under it; and no witness mentioned the name of any such process; and all the counsel says about its existence, is a bold assumption of a fact which does not exist; and he evidently hopes that his perpetual repetition of the fact will induce this court to presume its existence, without examining the Error Book.

The insinuation that the attorney who appeared for Foster in the suit of *Buffitt v. Foster*, may have colluded with Buffitt, is sufficiently answered by saying that fraud is never presumed, but must be proved; and that if the appearance of the defendant is to be presumed fraudulent without proof, few records of judgment would be *prima facie* evidence.

Offensive as this insinuation is, it should be pardoned, perhaps, in counsel who would try to prove his own client stole our execution—who would claim that his proof was sufficient to establish that fact, and then insist he was entitled to notice to produce it, and finally excepting to the decision of the court, upon the ground that they were more slow than himself in believing in the guilt of his client.

We insist that the mortgage, and all evidence relating to it, was irrelevant, so far as the defendant was concerned, because he did not connect himself with it: and we still insist, whether said mortgage was good, bad, or indifferent, was a question to be settled between the plaintiff in the execution and the owner of the mortgage; and they having adjusted that matter, this defendant cannot legally interfere to defeat that settlement.

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Finally, we insist that the plaintiff established a good cause of action—that the defendant did not show any defence—and that, consequently, the judgment of the supreme court should be reversed, and that of the common pleas affirmed.

Job Pierson, attorney and counsel for defendant in error.

First. Mattison, the plaintiff, at the time of the pretended levy, had no right to the possession of the property.

1. Because the property was then in the actual possession of Doctor Lyon, under a mortgage sworn to be valid—admitted to be valid by Buffitt, the plaintiff in the execution, who purchased the mortgage after suit brought, thereby admitting the entire title of Lyon at the time of the levy, and at the time plaintiff recovered the judgment in this suit. (2 *Harr. Rep.* 1.)

2. Because the property in question had been levied upon by virtue of an attachment, before the pretended levy under plaintiff's execution. (*Dubois v. Harcourt*, 20 *Wend. R.* 41.)

This case alone is decisive of the cause in controversy. The sheriff, on the 4th of August, 1834, had levied upon part of the property of the defendant in the execution, and made an inventory of some wood at a distance from the house: on the 5th of August an attachment seized the wood which was inventoried by the sheriff: on the same 5th of August, and before the attachment was levied, one Ray, a constable, levied on the same wood.

The court of common pleas decided,—

(1.) That an attachment levied, has preference to an execution under which a levy has not been made.

(2.) That to maintain trover, plaintiff must have either an absolute or special property in the goods. The court doubt whether the officer had even a special property. But they decide that it is perfectly clear that the officer, the plaintiff, had no right to the possession at the time of the conversion by the defendant. It is impossible (say they) to give each officer the legal control of the property, consistent with law or the rights of the party making the first levy.

Second. The court of common pleas erred in not allowing the defendant to prove that the execution, issued by the jus-

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tice, was invalid and prematurely issued. The plaintiff, when he seeks to make out his title to property, must prove that all the proceedings are regular. (*Earl v. Camp*, 16 *Wend.* 562; 2 *R. S.*, p. 178, §§ 133, 134, 135.)

Execution could not regularly issue, without oath.

Third. There was no evidence that the justice had jurisdiction in the cause of *Buffitt v. Foster*. It did not appear when the summons was issued, or when it was served. The appearance of a person purporting to be an attorney of Foster, does not amount to a waiver, because there was no authority of the attorney proved. Such authority must in all cases be proved, unless admitted; and it was not admitted on the trial of the cause. (*Wheeler v. Sampson*, 14 *John. R.* 481; 2 *R. S.* p. 233, § 45.)

Fourth. The court of common pleas erred in allowing the declarations of the plaintiff, as to his levy, to be received in evidence.

Fifth. The court of common pleas erred in not permitting the defendant to give evidence of the whole of the declarations of the defendant, made at the time when the plaintiff proved a part of them.

To prove a conversion, the plaintiff showed that defendant directed Allen to sell the goods. Defendant offered to prove that, in the same conversation, the defendant said that the goods had been seized by an attachment in his favor, under which he had obtained judgment and execution; and that he told him to sell under the execution.

Sixth. The court of common pleas erred in refusing to nonsuit the plaintiff.

1. The plaintiff himself proved that the goods were seized by the defendant's attachment previous to his levy; he was bound, therefore, to prove the attachment invalid; otherwise the defendant's title was perfect.

2. The property in question was mortgaged to Dr. Lyon, and the property was shown to be of no more value than the mortgage. The mortgage is admitted to be valid, by the plaintiff in the execution having purchased it after this suit was brought.

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Seventh. The court of common pleas erred in deciding that the plaintiff had any special property in the goods; if he acquired any, it was merged by the purchase of the mortgage by Buffitt, the plaintiff in the execution, who had a right to control it and to merge it.

If the plaintiff is allowed to recover the value of the property, as he has done, Buffitt may also recover, in trover, the full value of the property against the defendant, under the mortgage assigned to him by Lyon.

Eighth. The court of common pleas erred in directing the jury to find a verdict for the full value of the property.

If plaintiff was entitled to recover at all, he should have recovered no more than the value of the property beyond the mortgage, which was nothing. And it is certain he should have recovered no more than the amount of the execution in his hands. (*Russell v. Butterfield*, 21 *Wend.* 300; *Spoor v. Holland*, 8 *Wend.* 445; *Linville v. Black*, 5 *Dana*, 176; *Chamberlin v. Shaw*, 18 *Pick.* 278; *White v. Webb*, 15 *Conn. Rep.* 302.)

Ninth. The court of common pleas erred in deciding that a conversion was proved on the part of defendant, and in directing the jury to find a verdict for the plaintiff to the value of the property pretended to be levied upon by the plaintiff, with interest thereon from the time of the sale.

The conversion was a question of fact, that ought to have been submitted to the jury. The allowance of interest should have been left to the jury, as a matter within their discretion. The court would not submit either question to the jury. (See pages 17 and 18 of *Error Book*; 5 *Car. & Payne*, 625; 2 *John. Rep.* 280; 8 *John.* 446.)

The grounds upon which the plaintiff sought to sustain his suit, present a tissue of contradictions.

1. He conceded that he must prove the regularity of his judgment and all subsequent proceedings, in order to make out even a special claim to the property in question in the constable. He attempted to do so. He proved by the justice a bare entry of a judgment; that the suit was commenced by sum-

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mons ; that the defendant, Foster, (who the plaintiff admits had absconded,) appeared by attorney.

But when the defendant (who, by the pleadings in the cause, was claiming the property under an attachment against Foster,) offers to prove that the execution was irregularly issued ; the plaintiff objects, and the court of common pleas sustains the objection.

The defendant then proceeded to show, and that, too, by the docket of the justice, that it did not appear that the summons was regular ; that the docket did not show that it was regularly issued, returned or served ; and that Foster, who had absconded, had appeared by attorney, without any evidence of authority to appear. Indeed, it appearing in evidence that the defendant Foster had absconded, it may be inferred that an attorney appeared who colluded with Buffitt, to enable him to obtain a judgment. The case of the 15 *Wendell*, 652, has no application, because Foster had absconded, and has never since sanctioned the acts of his pretended attorney.

The court decided that the defendant could not question the validity of the judgment, until he showed a right to the property.

Thus the court of common pleas overruled the cases of *Earl v. Camp*, 16 *Wendell*, 562 ; *Horton v. Hendershot*, 1 *Hill*, 118 ; *Dunlap v. Huntington*, 2 *Denio*, 643 ; and decided, in effect, that plaintiff need not show that the justice had jurisdiction, and need not therefore show that the plaintiff must prove what he commenced attempting to prove, viz. : the regularity of his proceedings. And the position is actually taken by the plaintiff, that if his judgment and execution were irregular and void, the defendant in the execution can only take advantage of it ; but the defendant in error, who was defending under an attachment against the same defendant, cannot ; and that the defendant in error, unless he shows a valid attachment, cannot impeach the plaintiff's judgment.

It perhaps did not occur to the plaintiff, that if nobody but Foster, the defendant in the *execution*, could complain of its invalidity, that it would follow that nobody but Foster, the defendant in the *attachment*, could complain of its validity.

Again, the plaintiff contended, and successfully, with the court of common pleas, that the plaintiff could give in evidence his own declarations to sustain his suit. And he also contended successfully with the same court, that the plaintiff could give in evidence a part of the declaration of the defendant, to prove a conversion and the defendant could not prove the remaining part of the same declaration, for the purpose of disproving it.

Again, the plaintiff claimed the property under a judgment and execution, both of which were void—conceded to be so—but alleged that the defendant in this suit could not question the validity.

The defendant in this suit claimed the property under an attachment, by virtue of which the property in question was seized before the pretended execution in favor of Buffitt was levied.

Notice that the defendant claimed the property under an attachment, was given in the pleadings and proceedings on the trial before the justice.

Evidence was given that the property was attached by Allen, the constable, before the plaintiff in this suit came to make a levy, and that Lyon, the mortgagee, receipted it to Allen before the execution was levied. No objection was made to this evidence. The validity of the attachment was not questioned on the trial. The mortgagee of the property, having it in possession, conceded the validity of the attachment, by receipting the property. Buffitt, the plaintiff in the execution under which the plaintiff seeks to recover, by virtue of his levy, conceded the validity of the mortgage on this property, to an amount of but a trifling value, if any, beyond the mortgage: he conceded the validity of the attachment, by taking an assignment of the mortgage with the attachment upon it, with the property receipted under the attachment. He conceded that his own execution was invalid by purchasing the mortgage after he had recovered a judgment in the justice's court, in this cause, though he evidently hoped, and perhaps was advised, that if his void judgment and execution failed him, he

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could, on appeal, sustain this suit under a valid mortgage, of which he became the assignee, after he discovered his difficulty, and long after this suit was commenced.

That he had been advised, is very probable; because the court of common pleas (*vide Error Book*, p. 17,) gravely decided that—

“A levy and conversion had been proved, inasmuch as Buffitt had obtained an assignment of the mortgage, which he had a right to do, to quiet his title without claiming under it; and as there was no other legal claim to the property, the plaintiff acquired a special property that enabled him to sustain this action, if Buffitt was not disposed to enforce his mortgage.” !!!

That is to say, the plaintiff acquired no claim to this property, by virtue of his levy under Buffitt's void judgment and execution. The judgment he recovered before the justice in this suit, was therefore invalid; but inasmuch as before the trial in the court of common pleas, on appeal, Buffitt, the plaintiff in the execution, had quieted his, Buffitt's, title; therefore, the constable acquired a special property, which he would not have had if Buffitt had not purchased the mortgage; nor could he have sustained this suit if Buffitt had not quieted his, Buffitt's, title, and was not disposed to interfere.

The judgment of the supreme court, reversing the judgment of the court of common pleas, should be therefore affirmed, with costs.

DECISION.—*Judgment affirmed.* For affirmance—JEWETT, BRONSON, GARDINER, RUGGLES and GRAY. For reversal—JONES, JOHNSON and WRIGHT.

NOTE.—GARDINER, J. *Held*, that the interest of Foster, the mortgagor and judgment debtor, was a right of redemption *only*—a mere chose in action; not the subject of levy and sale upon execution, unless united with a right to the possession for a definite period. (3 *Wend.* 500.) By the express terms of the mortgage, the mortgagee “was at all times, upon demand, entitled to possess, occupy, and enjoy” the property mortgaged, and the case showed that he had taken and held possession at the time of the levy.

The levy, therefore, by the plaintiff was wholly inoperative. It gave no lien upon the property, and consequently no right to maintain the action.

Reported 1 Comstock, 295.

Funck and others *agt.* Merian & Benard.

FUNCK and others, plaintiffs in error, *agt.* MERIAN & BENARD,
defendants in error.

Questions discussed.

1. Whether goods delivered into *public store*, on general order to discharge the ship, is a delivery to the *consignee*; and such a receipt of the goods by the consignee, as binds him to pay the *freight*?

2. Where the consignee endorses over the bills of lading, which are made payable to his order, and the assignee receives the goods—a portion from the ship, and the remainder from the public store; whether the *consignee* is still liable to the ship owner or master for the payment of the freight, or whether the *assignee* only is responsible?

THIS was an action of assumpsit brought in the superior court, by James Funck, Robert Carnley, Jacob A. Westervelt and Edward Boisgerard, against Jean J. Merian and Charles Benard, for payment of the following bills of freight, and which were the plaintiffs' bill of particulars, to wit:

“ 1839, November 4.

To freight on 9 packages in the packet ship Baltimore, from Havre in France, to New-York,	\$114.56
Primage, 10 per cent.	11.46

“ 1840, March 19.

To freight on 10 packages, in the packet ship Baltimore, from Havre in France, to New-York,	152.05
Primage, 10 per cent.	15.20

\$293.27”

The defendants pleaded non-assumpsit. The cause was brought to trial on the 20th of October, 1842, at the City Hall, before Hon. SAMUEL JONES, chief justice.

It was admitted by the counsel of the respective parties, that the first nine bales specified in the bill of particulars, were received from the ship Baltimore, into public store, on a general order to discharge the ship, on the 11th of November, 1839; and were delivered therefrom to Mainon & Bonnay, on the

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22d of February, 1840. And that five of the remaining ten bales, included and described in the bill of particulars, were received from ship Baltimore, into public store on like order, on the 26th of March, 1840; and delivered therefrom to Mainon & Bonnay, on the 22d of April, 1840. And that the other five bales were delivered from the ship to Mainon & Bonnay. And the whole nineteen bales received by them.

The following bills of lading, the translations thereof, and endorsements thereon, were also admitted; and which translations and endorsements were as follows, to wit:

J. Funck, captain of the ship Baltimore, now at Havre, about to go with the first favorable wind to New-York, acknowledge to have received and laden on board my said ship, and under M. B. deck, for account of whom it may concern, from

71 a 79 you, M. J. Troussel, nine bales willow baskets, measuring together eighteen hundred thirty-two feet—8s. 1832—8s.

\$114.54. the whole dry and in good order, marked and numbered as in the margin, which merchandize I

11.46. engage to carry and conduct in my said ship, the dangers and perils of the sea excepted, to the said

— place of New-York, and there to deliver them to Messrs. Merian & Benard, or to their order, on paying me for my freight two dollars and a half per ton of forty cubic feet, adding 10 per cent. primage. And to this effect, I bind myself, vessel and goods, with my said ship, freight and apparel as she now is. In testimony whereof, I have signed four bills of lading of one same tenor, one of which being accomplished, the others shall be of no effect.—Havre, the 24th September, 1839.

(Contents unknown to)

(Endorsed.)

Deliver the within to Messrs. Mainon & Bonnay.

New-York, 21st February, 1840.

MERIAN & BENARD.

J. Funck, captain of the ship Baltimore, now at Havre, about to go with the first favorable wind to New-York, ac-

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knowledge to have received and laden on board my said ship, and under deck, for account of whom it may concern, from you, M. J. Troussel, nine bales willow baskets, measuring together nineteen hundred and twenty feet, eight inches, 1920—8s.

One box do., measuring two hundred thirteen feet, four inches, 213—4s.

M. B. the whole dry and in good order, marked and
No. 10 a 18. numbered as in the margin, which merchandize I engage to carry in my said ship, (the dangers and perils of the sea excepted,) to the said place of

No. 19. New-York, and there to deliver them to Messrs. Merian & Benard, or to their order, on paying me for my freight two dollars and a half for the bales, and six dollars for the box, the ton of forty cubic feet, adding 10 per cent. primage.

\$120.05 And to this effect, I bind myself, vessel and
32 goods, with my said ship, freight and apparel as she now is.

\$152.05 In testimony whereof, I have signed four bills
15.21 of lading of the same tenor, one of which being accomplished, the others shall be of no effect.

\$167.25 Havre, the 15th January, 1840.

(Contents not known to)

(Endorsed.)

Deliver the within to Messrs. Mainon & Bonnay.

MERIAN & BENARD.

It was also admitted, that the amount of the freight and interest accruing upon the merchandize, specified in the bill of particulars, is therein correctly stated.

The counsel for the plaintiffs then produced as a witness,—
Edward Hincken, who, being sworn, testified that the plaintiffs are the owners of the ship *Baltimore*; that witness is a member of the firm of *Boyd & Hincken*, the agents of the *Havre* packets. That witness made out and caused to be presented to defendants, a bill of freight, for the goods specified in the bill of particulars; that this bill was included in a bill

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for other goods received for the defendants by the same vessel. That the bills of freight were presented by their collector, Mr. Turneure, and that witness understood from Mr. Turneure, that the defendants had requested that a separate bill for these goods might be made out, and presented to Mainon & Bonnay. That witness did accordingly make out the bills separately, and gave them to the clerk to collect. That he does not recollect any particular conversation with Mr. Merian respecting the bill; that it was a very usual thing for witness to separate the bills upon the request of parties, and collect freight from others; and that it was done more frequently for Merian & Benard, than any other house in New-York.

The counsel for the plaintiffs next produced as a witness,—

William Turneure, who, being sworn, testified that he is a clerk of Boyd & Hincken, and collects their freight bills; that defendants received other goods by the same ship. One bill was made out against defendants for the freight of all the goods consigned to defendants in the ship, and witness called on defendants and left the bill. On calling the second time, witness was requested by Mr. Merian to make out a separate bill for the goods included in the bill of particulars of plaintiffs against Mainon & Bonnay. That such bills were made out by Mr. Hincken, and presented by witness, and that Mainon & Bonnay promised witness to pay them; that thereupon bills were made out to defendants, for the balance of the goods by the same ship, of which bills the following are copies:

“ New-York, Nov. 5, 1839.

Messrs. Merian & Benard :

To owners of packet ship Baltimore,			
For freight of M. B., 225 packages	nine	2,700 a \$ 9	\$67.50
	2 do. ft.	367 a 10	9.15
			76.65
Primage, 10 per cent.			7.67
			\$84.32

Received payment,”

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“New-York, March 21, 1840.

Messrs. Merian & Benard :

To owners of packet ship Baltimore,					
For freight of A. H.	37-52	16	packgs., ft.	3,064 a \$10	\$76.59
H. A.	26-27	2	do. do.	24 a 12	7.20
J. T.	27	1	do. do.	226,11 a 2½	14.20
					<hr/>
					\$97.99
Primage, 10 per cent.					9.80
					<hr/>
					\$107.79

Received payment,”

Witness further testified, that the following receipts were given for the said bills :

“New-York, Nov. 22d, 1839 :—Received from Merian & Benard, eighty-four, 32–100 dollars, for freight per ship Baltimore, from Havre.

[\$84.32.]

BOYD & HINCKEN,
per WM. A. TURNEURE.”

“New-York, April 3d, 1840 :—Received from Merian & Benard, one hundred seven 79–100 dollars, for freight per ship Baltimore, from Havre.

[\$107.79.]

BOYD & HINCKEN,
per WM. A. TURNEURE.”

Witness further testified, that bills were made out to Mainon & Bonnay, for the goods specified in the bill of particulars, and were frequently presented to them ; that they promised to pay, but postponed the payment from time to time, and that, finally, witness understood they had failed. To a question by a juror, Had Mainon & Bonnay stopped payment when you presented them the bill ? Witness answered “he did not know.”

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The said plaintiffs thereupon rested. Whereupon, the counsel for the defendants opened his defence to the jury, and called as a witness—

Pierre Bonnay, who, being sworn, testified that the goods referred to in the bill of particulars, were ordered and purchased by deponent's firm, Mainon & Bonnay, from a house in France; that the defendants had no interest whatever in them; that they were forwarded to witness' house through the defendants, in order that witness might settle the payment of the price of the goods; that this was the course which had always been adopted with respect to witness' goods coming through the hands of the defendants, and also through Mr. Boisgerard, one of the plaintiffs; that the invoice of the goods was always made out to Mainon & Bonnay, and the bill of lading was sent to the defendants or Mr. Boisgerard, to be transferred to the witness, upon a settlement for the price of the goods; that these goods were, as in the case of all others, entered, and the duties paid by witness; that witness has in all cases received from Boyd & Hincken, as agents for the Havre packets, the bills of freight for goods forwarded through the defendants, which he has paid, until these bills; that he promised to pay these bills when presented, but was unable to do so. Witness further testified, that a great portion of the goods specified in the bill of particulars, being then a part of the stock in witness' store, were included in a general assignment of all the property, executed by Mainon & Bonnay, in July, 1840, to the defendants, for the benefit of creditors; that the defendants were the heaviest creditors.

The counsel for the defendants here rested.

His honor, the presiding judge, then charged the jury, that this case turned upon questions of law, involving the points of the liability of the defendants for the freight of these goods, and the discharge of them from such liability, if any had ever existed. That these questions would be reserved for ulterior consideration; but that, for the purposes of this trial, he should charge the jury that the defendants were liable for the freight, unless the jury should find that an express contract was entered

into by the plaintiffs to look to Mainon & Bonnay for the same, and to absolve the defendants from the obligation in the premises ; and with this charge, submitted the cause to the jury.

To this charge, the counsel for the defendants excepted, and the court noted the exception.

Under this charge, the jury immediately rendered a verdict for the plaintiffs, for three hundred and forty-nine dollars and sixteen cents.

The superior court, at general term, in May, 1843, overruled the bill of exceptions, and denied a new trial. The defendants brought a writ of error, and removed the judgment to the supreme court. And at the January term, 1847, that court reversed the judgment of the superior court, and awarded a new trial. (4 *Denio*, 110.) The plaintiffs thereupon brought error, and removed the judgment of the supreme court into the court of errors ; and the proceedings were subsequently transferred to this court.

The cause was submitted to the court upon printed points and arguments.

M. R. Zabriskie, attorney and counsel for plaintiffs in error.

First. The consignee is the natural person to whom to look for payment of freight. And when goods have been delivered to him in accordance with the bill of lading, or the known custom of the port, he is liable. (*Kent's Com.*, vol. 3, p. 222, 5th ed. ; *Abbot on Shipping*, p. 414, *Lon. ed.* of 1844 ; *Sanders v. Vanzeller*, 4 *Queen's Bench Rep.*, p. 260.)

In this case, the goods were delivered into public store on general order to discharge the ship. Such order was compulsory upon the plaintiffs, and delivery under it to the government, after the bill for the freight had been rendered, and without notice that defendants were not responsible for the freight, was a *delivery to defendants*. (*Laws of U. S.* 1799, ch. 128, §§ 23, 25, 36, 49, 53, 56, 62.)

Second. The bills of lading were not endorsed over by de-

fendants, until after a part of the goods had been for several months in the public warehouses. During all this time the defendants were the owners of the goods, and as such bound to pay the freight.

They can only be discharged from the payment by showing :

1. That they refused to receive the goods, and gave notice of such refusal to the plaintiffs.

2. That an express contract was entered into, to discharge the defendants from their liability.

In the United States, the master cannot enter goods in his own name, and thus preserve his lien for freight. (*Harris v. Dennie*, 3 *Peters*, 293.)

On the 24th of September, 1839, the plaintiffs received on board the packet ship *Baltimore*, in the port of Havre de Grace, in France, nine bales, containing willow baskets, for which the master signed the usual printed bills of lading, (*pp.* 10 and 11 of the case,) filled in with the names of the defendants as the consignees.

The nine bales arrived in due course, and soon after, Mr. Turneure, the collecting clerk of Messrs. Boyd & Hincken, the agents of the ship, called on the defendants to collect the bill for the freight. This bill contained charges for freight of other goods consigned to defendants by the same vessel. Instead of paying it, they requested the clerk to separate the bills ; that is, to make out separate bills against different parties, for various portions of the articles consigned to defendants—a very customary thing, it appears, to be done in such cases, and “done more frequently for the defendants than for any other house in New-York.” (*Page* 12.)

A bill for the nine bales of baskets was accordingly made out against Mainon & Bonnay.

It does not appear that any request was made to plaintiffs, to collect the amount of the bill from Mainon & Bonnay ; nor does it appear that the bill, or a copy of it, was left with defendants that they might collect it. They, however, on the 22d November, 1839, (p. 14,) paid for the freight of so much

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of the goods consigned to them, as was not included in bills which they had asked to have made out against others.

On the 15th of January, 1840, plaintiffs received on board the same ship, at the same port, ten other bales of willow baskets, shipped by the same person in Havre, and consigned to the defendants. (*Bill of Lading*, p. 11.)

The same circumstances occurred with regard to this consignment. Plaintiffs presented their bill. Defendants asked to have it separated, (into how many does not appear,) and that a bill for these ten bales might be made out against Mainon & Bonnay. It was done. On the 3d April, 1840, defendants paid plaintiffs \$107.90, "for freight per Baltimore, from Havre." The receipt was not "in full."

The bills against Mainon & Bonnay, as a matter of politeness to defendants, were presented to them, and they promised to pay them ; but afterwards refused to do so : and when the clerk presented the bills again to the defendants, they refused to pay them, and set up that they were not the owners of the goods, and were therefore not responsible for the freight.

The goods belonged to the manufacturers, in France. (*Bonnay's testimony*, p. 14.)

The first lot was sold by defendants, as the manufacturers' agents, to Mainon & Bonnay, on the 22d February, 1840, as appears by the endorsement on the bill of lading, (p. 11,) five months after the time of shipment.

The endorsement of the bill of lading of the second lot has no date.

Until the endorsements of the bills of lading, the title of the goods was in defendants.

As naked consignees, they were primarily liable to pay the freight. (*Kent's Com.*, vol. 3, p. 222, 5th ed.)

Mainon & Bonnay, as purchasers from them, were not liable. (*Artaza v. Smallpiece*, 1 *Esp. N. P. C.* 23 ; cited and approved by *Kent*.)

The goods were carried and delivered on the credit of the defendants ; they, having given no notice that the plaintiffs

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must look to their lien for the freight, by construction of law received them, and are liable on this ground.

They also received them, in fact, (a great part, if not the whole of them,) in July, 1840. (*Bonnay's testimony*, p. 15.)

This suit was not begun until November, 1841.

F. Dominick, attorney and counsel for defendants in error.

First. A consignee of merchandize by a general ship, where there is no charter party, is not responsible for freight nakedly as consignee; but a receipt of the goods is requisite in order to create a liability. (*Cock v. Taylor*, 13 *East. R.* 399; *Trask v. Duval*, 4 *Wash. C. C. R.* 184.)

Second. Where a consignee endorses a bill of lading, the assignee becomes the appointee of the original shipper, to receive the goods; and if the goods be received by him, he is the only party liable for the freight. (*Tobin v. Crawford*, 5 *Mees. & Wels.* 235; *same case affirmed in Exch. Chamber*, 9 *Mees. & Wels.* 716.)

The charge of the judge, therefore, that the defendants in error were liable as consignees, notwithstanding they had endorsed over the bill of lading to parties who received the goods, is erroneous; and that decision was properly reversed by the supreme court.

Argument.—I shall only refer to such facts as have not been stated; or, as I conceive, have been misapprehended by the opposite counsel.

After the separation of the bills for freight, and the payment by the defendants of the freight on their own goods; it appears (*pp.* 14 and 15,) that those made out to Mainon & Bonnay were *frequently* presented, payment promised, *never refused*, but postponed; and credit given until they finally failed.

It does not appear that notice was ever given to the defendants of any claim, until by this suit, after the lapse of two years, in November, 1841.

The testimony of Bonnay (*p.* 14,) shows that the property was always owned by, and at the risk of Mainon & Bonnay;

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and that the defendants had no interest in it ; and the bills made out to the defendants, for freight on their own goods, (*p.* 13,) and the receipts therefor, (*p.* 14,) and the course of the agent with respect to the bills for the freight now claimed, prove that he understood that Mainon & Bonnay were the owners of the goods, and alone liable for freight.

The counsel for the plaintiffs in error appears to concede the well established principle, that a receipt of the goods is necessary to fix a liability upon a consignee, for freight ; but he contends that a deposite in the public store is equivalent to a delivery.

Now, supposing this to be so, how would he overcome the effect of the fact, to which he has not adverted, and which appears from the admission, (*p.* 10,) that five bales of the last lot were delivered to Mainon & Bonnay *from the ship*. That firm must already, under the act of congress, have made the entry as owners, covering the other five bales of the same lot subsequently sent to the public store.

Here then was no delivery to the defendants, either actually or constructively, according to the argument of the counsel, if sound ; and still, the freight on these ten bales is included in the verdict ; and the charge of the judge of which we complain was, that the defendants were liable for the whole freight.

The law of the case, as I understand it, is this :

On the shipment of goods under a bill of lading, the contract of the shipowner is with the shipper alone ; and it was originally held that this was the only party against whom recourse could be had.

It was not until 1790, that it was held that the consignee could be in any case made responsible ; and his liability was then put upon the express ground that, *by the receipt of the goods*, an implied promise to pay freight was raised, such payment being the condition upon which the goods were to be delivered.

When the consignee endorses over the bill of lading, no privity arises between himself and the shipowner—he substitutes another appointee of the shipper, who has the same right to

receive the goods on the payment of freight; and whose receipt raises an implied promise on his own part to pay freight; and if the goods are delivered to, or received by the assignee of the bill of lading, without such payment, there is still no foundation for any obligation on the part of the consignee. His endorsement does not create the assignee his attorney or agent to receive the goods; it does not authorize a pledge of his credit for the freight, nor is he responsible on the naked endorsement, as in the case of promissory notes and bills of exchange.

The cases of *Artaza v. Smallpiece*, and *The Theresa Bonita*, holding that the assignee is not responsible for freight, are expressly overruled in *Cock v. Taylor*; and the doctrine of the last case is fully supported in *Trask v. Duval*. Chancellor KENT, in his collection of authorities on questions of freight, states the decision of *Artaza v. Smallpiece*, but without comment or approval. The case of *Tobin v. Crawford* establishes that where the bill of lading has been endorsed, and the goods received by the assignee, the consignee is not responsible. These cases are on the points.

In this case, the deposit of a portion of the goods in the public store, created no privity between the shipowner and the defendants; it was not a delivery to them, it was not the act of consignees, nor does it destroy the lien of the master: for it was not a *voluntary delivery*. The act of congress was not intended to disturb the relations among parties in respect to ownership of, or liens upon property, but nakedly to secure the rights of the government.

The storekeeper becomes the legal custodian of the property; he represents the interest of all parties. When the permit is given, that merely certifies that the duties are paid; and should the master have interposed a notice of his lien for freight, we believe this could not have been safely disregarded; an injunction would certainly have protected the ship-owner's rights.

Whether or not, however, the act of congress takes away the lien of the master, it is sufficient for us to say, that it does not

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make such deposit equivalent to a delivery to the consignee ; nor does it create any new liability not known to the common law on his part. In this case, the goods were actually received by others ; there is therefore no foundation for a liability on the part of the consignees.

Here, then, Mainon & Bonnay received a portion of the goods from the ship, the balance from the public store, no measures being taken by the master to preserve his lien. They were the owners of the goods, they promised to pay the freight, they never refused, their course of business was well known to Mr. Boisgerard, one of the plaintiffs ; finally they failed, and after two years, without previous notice, this claim is set up against the defendants, who had no interest, and had done no other act than nakedly to endorse a bill of lading, transferring the authority to Mainon & Bonnay to receive the goods *on payment of freight*.

Reply.—The defendant's counsel is mistaken, in supposing that any credit was given to Mainon & Bonnay, by the plaintiffs.

It does not appear affirmatively in the case ; nor is it true, in fact ; nor can it be fairly inferred from the circumstance of the plaintiffs presenting them with a bill. The bill was presented only at the defendants' request, and as a matter of politeness to them ; and although Mainon & Bonnay did promise to pay it, yet that did not raise an *assumpsit* on their part, being without consideration as between the plaintiffs and them ; much less did it operate to release any responsibility on the part of the defendants.

Nor can any inference, unfavorable to the plaintiffs, be made from the fact of this suit not having been commenced until sixteen months (not two years, as stated by the counsel,) after Mainon & Bonnay's failure, and the return of the goods by them to the defendants. On the contrary, if the counsel had inferred that, during all this time, the plaintiffs, by their agents, were reasoning with the defendants, and endeavoring to induce them by gentle means to pay the demand, he would have been much nearer the truth.

Again, I do not see how the counsel can infer from Bonnay's testimony, that he and his partner were the owners of the goods, when it directly appears that the goods were sent to the defendants as the agents of the manufacturer in France; to be held by them until they were paid for. (Page 15.)

To maintain, under such a state of facts, that the defendants were mere naked consignees without interest; and to endeavor to apply to them the principles of law, applying to mere naked consignees, seems to me, with due deference to the opinion of the court below, a proposition somewhat difficult to establish.

But even granting, for the sake of the argument, that it was so; granting that the goods had been shipped to them from Europe, without their knowledge, and by persons entirely unknown to them; I still contend, that under the circumstances, they would have been liable, on the ground of their neglect to inform the plaintiffs of the true state of the case. It was a *suppressio veri*, and justified the plaintiffs in delivering the goods to another party, under the belief that the defendants would pay the freight.

They were the consignees on the bill of lading, and, as such, the persons to whom the carrier was naturally to look for the freight. They were *prima facie* responsible, and that responsibility could only be relieved by some action on their part; such as giving notice that they were not the owners of the goods, and did not consider themselves responsible.

They knew perfectly well that Mainon & Bonnay were persons of no standing and credit, and that the plaintiffs would not have delivered the goods, if they had known that they must look to them only for the freight.

It was in the power of the defendants to have protected the plaintiffs, while the goods were yet in the ship, by disclosing the true state of the facts; they had repeated opportunities to do so, as regards both shipments, and it was their duty to have done so; as much so as it was their duty to protect their principal in France, by withholding the goods until they were paid for them.

Having omitted to do so, if they really sold the goods to

Mainon & Bonnay, without adding the freight to the price, (as is customary in such cases, and as they ought to have done;) it is their misfortune, and should not be visited on the plaintiffs, who are free from all blame, and who only acted, in allowing the goods to go to the public store, in obedience to the law, and in accordance with the usage and the well known custom of the port.

They certainly are innocent in the premises; they have earned their money, and if this judgment goes against them, will be without redress. The defendants, on the other hand, may have already received the freight in the price of the goods when they sold them. There is nothing to contradict such an inference in the case. At all events, they probably protected themselves out of the goods when returned to them by Mainon & Bonnay, under the general assignment made by them to the defendants.

And if they are still losers, they have their remedy over, unless the loss was incurred by negligence on their part, against the manufacturer in France; a remedy which is entirely debarred to the plaintiffs, as they do not even know his name or place of residence. The defendants acted as his agents, and were, no doubt, paid for their services. In the performance of their duties to him, they suffered the goods to go into public store, and to remain there (a part of them) for three months.

During all this time, to whom did the goods belong?

Certainly not to Mainon & Bonnay. If they had been destroyed by fire, the loss would not have fallen on them; but on the manufacturer; and the defendants, as his agents, would have been culpably negligent if they had not kept them insured; the goods were under their power and control; they had duties to perform in relation to them, to the government, and to others, as well as to their principal.

If they have failed in any of those duties, they must pay the penalty. Their situation is similar to that of the drawee of a bill of exchange; to whom it has been presented for acceptance, and who refuses to accept or to return it.

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He makes himself liable even if the bill have been drawn on him without authority.

In this case, the defendants' name was not used without their consent; and the bills of lading, one of them at least, was kept by them for more than three months, and then endorsed over. Both of them were regularly endorsed. Here was a recognition of the defendants' agency, an acknowledgment, in writing, of their interest in the goods of such a nature as utterly does away with the idea of their being mere naked consignees.

The counsel alludes to the admission, in the case, that five of the bales, in the last shipment, were delivered to Mainon & Bonnay out of the ship; and he says, that if this be so, then, under the act of congress, the whole of the last invoice must have been entered by Mainon & Bonnay, as owners, previously to the delivery.

But it is also admitted, that the other five bales of this shipment went into public store, "*on general order.*" (Page 10.)

Now, the only object in sending goods into the public store, is to protect the government in the collection of the duties; duties cannot be paid on a part of an invoice, and left unpaid on part. If a part went into public store, another part could not have been delivered to Mainon & Bonnay. The admission in the case must, therefore, have been made in error.

But, be this as it may—

The five bales, if delivered to Mainon & Bonnay, were not delivered by the plaintiffs, but by the government. The government, by its officers, takes charge of every cargo, and the master has no manner of control over the delivery. The course is for the collector, after the duties are paid, to send down his orders to his officer, having the custody of the cargo, to deliver it to the parties who have produced to the collector the proper evidences of title, and paid the duties. The order is called a permit. Such an order must have been produced to the inspector on board, by Mainon & Bonnay, before he delivered to them the five bales, (if he did deliver them.)

But even if the five bales were delivered, according to the argument of the opposite counsel, the plaintiffs still retained

their lien for the whole freight on the remaining five which went into public store. The defendants knew that they were taken there on the 26th of March, (*p.* 10.) On the 3d April, following, (*p.* 14,) they paid their bill for the freight of the other goods received by them on the voyage. Here was another chance for them to warn the plaintiffs to make an attempt, if they did not expect to pay it themselves, at least to secure them their money. But, as on the former occasions, nothing fell from them.

Now, with regard to the cases; putting out of view *Artaza v. Smallpiece*, (1 *Esp. R.* 23,) which I still believe to be law, notwithstanding the doctrine in *Cock v. Taylor* to the contrary; it is submitted that they do not warrant the inference, which seems to have been adopted by the court below, that it is the *receipt* of goods alone which determines the liability to pay freight.

In *Wilson v. Kymer*, (1 *M. & S.* 157,) the defendants were endorsees of the bill of lading. The goods went into the dock company's stores, and defendants afterwards received them out of store *on the order of the consignees*.

(It does not appear if the order was on the bill of lading, or on a separate piece of paper. In the case before the court, it was on the bill of lading.)

It was held that the defendant was not liable, because he had not received the goods under the bill of lading, but on the order.

He was, however, held liable on another ground.

In *Scarfe v. Sir John Tobin*, (3 *Barn. & Adol.* 523,) defendant was the consignee by name, but was held not liable for general average, though he had received the goods with notice of the claim.

In *Sanders v. Vanzeller*, (4 *Q. B. Rep.* 260,) defendant had purchased a cargo of wool from the consignee, paid part of the purchase money, and stipulated in writing to pay the balance, and the freight. He afterwards refused to pay, on the ground that the article was not according to sample; but, nevertheless,

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he received the wool and sold it for his advances. He was holden not liable for the freight.

Ward v. Felton, (1 *East*, 507,) is another case in point.

In all the cases cited *contra*, and referred to by the court below, (with the exception of *Trask v. Duval*,) *there was no consignee named*; the bill of lading being to "order." This is always considered enough to put the master on inquiry. It is a suspicious circumstance. It is very different, when a well known name appears on the bill of lading. Among hundreds of packages arriving in the New-York packets, there are very few shipped "to order."

In England, the shipper alone, prior to 1790, was holden liable for freight. Afterwards, the consignee, as well as the shipper, was holden. And finally, for the convenience of trade, and to favor the ship owner, and not the consignee, it was holden that the receiver of the goods, under the bill of lading, was also liable.

Cock v. Taylor, (13 *East*, 399,) is, perhaps, the earliest reported case maintaining this doctrine. It was a case of goods shipped on board a vessel, bound to London, by Montgomery & Co., at Alicante, to the order of Hargreaves & Co., of Algiers. The bill of lading was endorsed by Hargreaves & Co., to Peters, of Gibraltar; and by Peters again endorsed to Taylor & Son, of London, who received the goods.

It was right that Taylor should pay. It would have been very unjust to have sent the master back to Algiers, and all round the globe to get his due.

If the defendant had colluded with the shippers to cheat the master, it was right that he should pay.

If he was an innocent purchaser, he was still liable; because, under the circumstances, it was his duty to see that his title was clear, before he paid his money. There was enough to put him on inquiry; as there was also in the case before the court.

In *Trask v. Duval*, (4 *Wash. C. C. R.* 180,) the captain refused to deliver the goods to the consignee, unless the freight was first paid. The defendant then came forward and agreed,

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that if the consignee did not pay, he would ; and he took an assignment of the bill of lading, and received the goods and sold them.

The court held him liable for the freight on his *promise* to pay it.

In *Tobin v. Crawford*, Coupland & Duncan, who received the goods at London, where they were unladen, (the defendant did not live there,) were represented to be the agents of Crawford. But the court was not satisfied that such was the case. (5 *Mees. & Wels.* 239, PARKE, J.)

And lord ABINGER expressly puts the decision on the ground, that the credit was not given to the defendant, but to Coupland & Duncan, the *plaintiff having charged them in his books with the freight.*

In all of these cases, the decision was according to the substantial justice and equity of the case ; and it would be rather a singular spectacle to see the courts of this country, where, in many respects, strange as it may sound, the law is much less favorable to commerce than it is in England, measuring out the strict measure of technical law in every case, without any regard to its peculiar characteristics.

In England, the master, where freight is unpaid, can enter the goods in his own name, and so collect what is due him.

All the American authorities assert that it can be done here ; *but it is not so.*

It never has been done in practice, and there is nothing in the laws of congress allowing it to be done.

So in England, and on the continent, where goods are invoiced too low, with a view to defraud the government in the duties, the goods are not seized and confiscated as with us, but the government takes them from the importer at ten per cent. over his valuation, and pays the freight. With us, the government officers will not take any notice of a claim put in for freight on goods while in the public stores. It is not so in England. In this country, it is even doubtful if the government officials would be bound by an injunction out of the state

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courts, or be in any way subject to the operation of state laws. (*Harris v. Dennie*, 3 *Peters*, 303.)

But granting that they are liable, and granting that in a case like the present, the consignee is not ; it amounts then to this : That every owner of a packet ship must stand ready, on every arrival of his ship, with a stereotyped bill in chancery and injunction, to plaster on every single case of goods which has not been "permitted," within fifteen days after arrival. If this be so, and if the consignee can relieve himself from all liability, by assigning over his bill of lading, perhaps to a fictitious person, perhaps to one living in Chicago, or in Seringapatam, (and that person can again assign it over *ad infinitum*,) then we shall require a new judiciary act, and some hundreds of new elective judges, with equity powers to hold their chambers, perhaps, in the corners of the merchants' warehouses, and their courts on the ends of the piers.

The happy effect of such a state of things on commerce, and on the community at large, may well be conceived.

We have done well heretofore, under the general belief, among merchants, that "the consignee is primarily liable for the freight," (as the late Mr. Chancellor KENT expresses it.) I entreat the court to beware how they overturn this ancient doctrine. This case is a test case ; it is not an action brought to recover a few hundred dollars, but to settle a principle ; as such, the decision of the court of last resort is anxiously looked for, particularly by those who, from the peculiar nature of their carrying trade, are most interested—the owners of the packets sailing from the port of New-York.

One word more ; with regard to the mention made by defendants' witness, Bonnay, of Mr. Boisgerard, one of the plaintiffs, and the allusion to him by the counsel at the close of his argument.

Mr. Boisgerard is a Frenchman by birth, though naturalized here, having received his mercantile education in this city, some thirty years ago. He is a merchant at Havre, and has not been in this country for twenty years, (as I am credibly informed.) It may be that he has an agency in this city, but I

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have no hesitation in saying, that he personally knows nothing of Mainon & Bonnay, or of their affairs; and also, that he is utterly ignorant of the facts of this case, and of all the details of the business of the ship Baltimore.

DECISION—*Judgment affirmed.* For *affirmance*—JEWETT, Ch. J., BRONSON, GARDINER, WRIGHT, RUGGLES and JOHNSON, JJ. For *reversal*—JONES and GRAY, JJ.

NOTE.—As there does not appear to be any written opinion by this court, it is presumed they adopted the opinion of the supreme court, (4 *Denio*, 110,) JEWETT, justice, which *held*,—That the obligation to pay freight rested on the bill of lading, by which its payment was made a condition of delivery to the consignee or his order. The master was not bound to part with the goods until the freight was paid; but did not, by delivering the goods before payment, waive or discharge his legal right to demand payment of the person who, by the principles of law, was primarily liable to pay.

It was well settled, that when the goods, by the terms of the bill of lading, are to be delivered to the *consignee or to his order* on payment of freight; the party *receiving* them, whether the consignee, or endorsee, to whom the bill of lading has been transferred by the consignee, makes himself responsible for the payment of the freight. The law implies a promise on his part to pay the freight; such being the terms on which, by the bill of lading, the goods were to be delivered. By the act of accepting and receiving, the party makes himself a party to the contract.

In this case, the goods were consigned to the defendants, *or to their order*. They endorsed the bills of lading, and ordered a delivery to Mainon & Bonnay, to whom the goods were delivered. *They*, and *not* the defendants, were therefore bound to pay the freight.

Not reported.

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SHINDLER, plaintiff in error, *agt.* HOUSTON, defendant in error.

Questions discussed.

1. Whether the evidence in this case showed a *sale and delivery* of a pile of lumber?
2. Whether the agreement of the parties was within the statute of frauds—there being something to be done, to complete a sale and delivery?

THIS was an action of assumpsit, brought in the Troy justices' court, by Houston against Shindler, to recover the value of a lot of lumber. The plaintiff recovered \$55.45 damages and costs. Shindler appealed to the Troy mayor's court.

On the trial in the mayor's court, on the 12th November, 1844, it was admitted by the attorneys for the respective parties, that only the testimony of *James Patterson* be taken as to the sale of June or July, 1841; and that the amount of the lumber be considered as that sworn to by the inspector on the former trial; that there was no evidence that the position of the lumber was changed. Also, admitted that all the lumber was measured on the boat, and was all off the boat at the time of the conversation sworn to, by the witness *Patterson*, on the former trial—that the lumber was measured in two qualities, by the inspector, (qualities and quantities stated,) but without any direction to that effect, from the plaintiff or defendant. And that the price testified to amounted to \$52.51.

The testimony of *James Patterson*, the only witness, is here given entire, as follows:

I know the parties by sight; acquainted with plaintiff for a good many years. I was present at a conversation between the parties, relative to the purchase of some lumber, the latter part of June or the fore part of July, 1841. It was on the dock known as House's dock, in Troy. Plaintiff came into Troy with two or three boat loads of lumber, and he sold his lumber principally to Mr. House; and he had a little lot of lumber, of scantling and curled maple, that he also wanted to

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sell to House. House declined buying the curled maple and scantling, till it came off the boat, so that he could see it. After the lumber came off the boat, and was piled on the dock, plaintiff said to House, "now give me an offer for the lumber which is now off the boat." House replied, "I am in a hurry, and I have no time to make a bargain with you. There is a man," says he, pointing to defendant, "who will buy it of you." This was the first time I had seen the defendant. Plaintiff asked House if Shindler (defendant) was responsible or good; I think he said good. House said, any bargain he would make with him for the lumber, he, House, would pay it. Then plaintiff motioned to defendant with his finger, and said, "Halloo! man, this way"—defendant came up to where we were, and asked what was wanted; plaintiff told him (defendant) to make an offer for that lumber, which was now off the boat; defendant asked him what he asked for it; plaintiff told him, he asked four cents a foot for the plank, (curled maple,) and defendant told him he could not give that; then, plaintiff says, "What will you give for the plank?" Defendant told him he would give him three cents a foot; then plaintiff asked him what he would give for the scantling; defendant said he would give $1\frac{1}{2}$ cents a foot for them; plaintiff said, "the lumber is yours." Defendant told plaintiff to go to the inspector, and get the inspector's bill of it, and carry it to Mr. House, and Mr. House would pay it, for he (defendant) was in a hurry to go to New-York that afternoon. I don't recollect of any remark further at that time being made. I am not positive that defendant said anything about lumber being taken on the boat. In reply to question; no one was present except defendant, plaintiff and myself, at the conversation; there were men tending to lumber two or three rods off, or less—a short distance; I was sitting on the plank in question at the time of the conversation; I went with plaintiff to House's office, I think the next day, but it might have been the day after; I was with the plaintiff when he received the inspector's bill from the inspector, and saw him receive it; that bill was presented House at his office at the time I went there; when plaintiff presented

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the inspector's bill to House, House looked at it, and said defendant had been there and left a memorandum of how it was to be paid, and read it over to plaintiff; plaintiff said that was not according to the contract, and House said he didn't know anything about that; plaintiff told House what the contract was, and asked me if those things were so or not; I told him they were; he did not pay for the lumber, and said, as a reason. that defendant said that the bargain was different, and he did not wish to depart from the instructions of his friend, as he had a great deal of dealing with him. My impression is, that the lumber was measured by Mr. Ostrom, as it came off the boat; I saw the inspector measuring the lumber on the boat, and I know it was the same lumber, as I had tried to purchase it at Brockport; I refer now to the plank; the plank and scantling were both off the boat at the time of the conversation; I did not see the inspector measuring scantling—only the plank; I think this conversation on the dock was in the afternoon.

And the said counsel for the said appellant did then and there request the said recorder to charge the said jury:

1. That the right of property in said lumber did not pass by the agreement, it being within the statute of frauds; and that the sale was incomplete, there being something yet to be done.

2. The delivery of the inspector's bill was a condition precedent to a vesting of the right of property in the defendant, appellant, and that the defendant, appellant, having the next day, at the time the inspection bill was presented, declined paying for the lumber, the right of property did not pass to defendant, appellant, but remained in the plaintiff, appellee; and that defendant, appellant, is not liable therefor, as for lumber sold and delivered.

But the said recorder refused and declined so to charge the jury. To which the said counsel for the said appellant did then and there except.

And the said recorder did then and there declare, and deliver his opinion to the jury aforesaid, that the several matters so produced, and given in evidence as aforesaid, were sufficient to entitle the said appellee to a verdict; if they believed it

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was the intention of the parties to consider the lumber delivered at that time, and that nothing further was agreed or contemplated being done to pass the title and possession of the lumber. To which opinion and charge of the said recorder, the said counsel for the said appellant did then and there except.

And the said recorder did then and there declare, and deliver his opinion to the said jury, and charged them that the contract was not within the statute of frauds, and required no note or memorandum in writing, and to be subscribed by the party to be charged thereby, provided the jury should find, from the evidence, that there was a delivery of the lumber, and an acceptance of the same, by the defendant, appellant. To which opinion and charge of the recorder, the said counsel for the said appellant did then and there except.

The jury found a verdict for the plaintiff, of \$52.51 damages. Judgment having been entered, Shindler brought a writ of error, and removed the judgment to the supreme court. Where, at January term, 1845, the judgment of the mayor's court was affirmed. Shindler brought error, and removed the judgment to the court of errors; and the proceedings subsequently were transferred to this court.

J. A. Millard, attorney and

Gardner Stow & N. Hill, jr., counsel for plaintiff in error.

First. The sale was not complete. No property passed.

1. Because the bargain was not closed. No promise was made by Houston, that he would procure the inspection bill and deliver it to House. He was still at liberty to sell to any body else. He said nothing to *bind* himself; and when one party is not bound, the other is not bound. (4 *Bing.* 653; 3 *Turn. R.* 653.)

2. The sale was not complete, because something was to be done by the vendor. The getting of the inspection bill, and delivering it to House, was a *condition precedent* to be performed by Houston. Until then, the sale was not *absolute*, but *condi-*

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tional. It might never be performed; and in that case, the property would remain in *statu quo.* (7 *Wend.* 330.)

3. The sale was intended to be a *cash* sale. Its terms show that no credit was intended on either side. The law in such a case, from necessity, makes the delivery of the thing sold, and the payment of the price, contemporaneous acts. The property could not pass until the price should be paid. (6 *Cow.* 110, 113; 2 *Barn. & Cress.* 540; 15 *John.* 349; 6 *Barn. & Cress.* 364; 6 *Cow.* 250; 5 *Barn. & Cress.* 757; 7 *Cow.* 85; 13 *East*, 522; 3 *Wend.* 112; 3 *New Hamp. R.* 382; 14 *Wend.* 31; 2 *Maule & Sel.* 397; 6 *East*, 414; 5 *Taunton*, 617, 621; *Bull. N. P.* 50; 2 *Hen. Blac.* 3, 16.)

Second. The case is within the statute of frauds, requiring a note in writing.

There was no *acceptance and receiving* of the lumber by Shindler, the vendee, within the intent and meaning of the statute.

To take the case out of the statute, there must be something more than what would be sufficient to *change the property at common law*—something more than would be sufficient to constitute a *delivery* at common law.

The elements which enter into and constitute a complete sale and transfer of goods, when the price is \$50 or more, and there is no note in writing, and no payment of the purchase money, are as follows, viz.:

1. A *bargain* intended to change the right of property. 'This is the act of *both* parties.

2. A *delivery* of the property and the *actual possession*, *discharged of all lien*, to the vendee as *absolute owner*. This is the act of the *seller*.

3. An *acceptance and receiving* of the entire property, and *actual possession* of some part of the goods, as *absolute owner*, *discharged of all lien for the purchase money*. These are the acts of the *buyer*.

There was nothing proved here but the *bargain*; and that was void by the statute of frauds. (3 *Bos. & Puller*, 233; 6 *Barn. & Cress.* 351; *Chit. on Con.* 389, 390; 3 *Dowl. & Ryl.*

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220, 822 ; 2 *Barn. & C.* 37 ; 3 *John.* 399 ; 10 *Bing.* 101, 376 ; 5 *Barn. & C.* 511, 514 ; 2 *Mee. & W.* 602, 656 ; 21 *Pick.* 384 ; 5 *Barn. & Ald.* 559 ; 1 *Dowl. & Ryl.* 128 ; 22 *Wend.* 659 ; 1 *Car. & Payne*, 272 ; 3 *Barn. & C.* 1 ; 2 *Car. & Payne*, 532 ; 4 *Maul. & Sel.* 262 ; 9 *Barn. & C.* 561 ; 7 *T. Rep.* 15, 17 ; 1 *C. & M.* 333 ; 6 *Wend.* 400 ; 11 *John.* 284.)

The recorder then erred.

I. In refusing to non-suit the plaintiff below.

1. Because there was no dispute about facts, and the whole question resolved itself into a question of law.

2. Because there was no proof of any kind, to show that there was an *acceptance and receiving* of the lumber, on the part of Shindler, within the meaning of the statute, upon which a jury could deliberate.

II. In refusing to charge the jury as requested.

1. Because the contract was void by the statute of frauds.

2. Because the sale was not complete—there being something to be done—the delivery of the inspector's bill.

3. Because the delivery of the inspector's bill was a condition precedent.

Third. The recorder further erred in this. That he misled and misdirected the jury in charging, that Houston was entitled to a verdict, if the jury should believe that it was the intention of the parties to consider the lumber delivered at the time of the bargain, and that nothing further was agreed or contemplated to pass the title and possession of the lumber.

1. Because it implied, and left the jury to infer, that they ought to find for Houston, if there was no proof that anything further was agreed on, or contemplated, to pass the title and possession of the lumber.

2. Because, by referring the matter to their *belief*, he left the jury to speculate about facts not proved, and come to conclusions without the proof of any facts from which they could be legally inferred. He might as well have left them to "believe" a note in writing had been executed—since there was no more evidence to prove an *acceptance and receiving* of the lumber, than to prove a note in writing.

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3. Because the recorder directed the attention of the jury to the *intention* of the parties, as the material object of inquiry, instead of the requirements of the statute of frauds; when he should have directed them to inquire (if indeed it were necessary to submit anything to the jury,) whether any facts and circumstances were proved to establish clearly, that Shindler had *accepted and received* the lumber, or some part thereof, as required by the statute.

4. Because the recorder, in his charge to the jury, did not discriminate between the facts, which might suffice for a sale and delivery at common law; and the facts amounting to an *acceptance and receiving* of the goods, necessary to a complete sale and transfer of the property under the statute,—thus misleading them from the true point of inquiry, the *acceptance* and receiving, under the statute; and confounding in their minds the distinction between the common law and statutory modes of passing property, where its value is \$50 or more.


5. Because the charge *tended*, if it were not *calculated*, to impress the jury, that if the parties “*considered*” the lumber delivered at the time of the bargain, it was enough to entitle Houston to recover, though there was no proof of an actual acceptance and receiving of the lumber by Shindler. The *act of accepting and receiving* required by the statute, to dispense with a note in writing, implies more than a simple act of the mind.

6. Because the recorder’s charge left the jury to infer that their *belief* would justify them in finding that the title and possession of the lumber passed to Shindler, though nothing was found to show his actual acceptance and receiving of it, or from which they could infer it.

7. Because the recorder, in effect, told the jury they were at liberty to find that Shindler accepted and received the lumber, though there was nothing proved in the case to establish it, or from which it could be legally inferred.

Fourth. The recorder erred, because, in charging the jury that the contract was not within the statute of frauds, provided they found from the evidence that there was a delivery of the lum-

ber, and an acceptance of the same by Shindler, he thus *assumed* that there *was* evidence from which they might legally infer such delivery and acceptance; and because he thus left to the jury to determine, without instruction, what constituted a *delivery and acceptance*, which is a question of law, as well as to determine whether the facts existed, which prove such a delivery and acceptance—and the charge thus tended to mislead the jury.


 *N. Hill, jr.*, in reply.—*Story on Sales*, § 295. 4th speaks of delivery; 2 *B. & C.* 37, HOLROYD, J.; *Story on Sales*, § 273; 3 *J.* 421.

Resting on *mere words*, this case goes *beyond any in the books*. No other case dispenses with *acts*—besides, cases say, *UNEQUIVOCAL acts*.

Depends on the *form of expression*—they *mistake* in this, witness changes the case. 2 *Kent*, 491; *Story on Sales*, § 290, 294.—*Forms of expression—phrases*—are not the species of evidence. The statute calls for—*WRITING, or ACTS*. Words, &c., very evil legislature intended to remedy. 1 *East*, 192, cited in opposition, strongest case can be found—strongest case for the other side—there vendee *sold to a third person who removed the stack of hay*—no other case goes so far—ponderous, he says, need not be handed over—statute says, shall be, or something else—Key, &c.,—he don't say *words*—a *visible symbol handed over in presence of witness*.

10 *Bing.* 99, 101, TINDAL, C. J., on 1 *East*; 12 *Mass.* 300—*nothing to do with statute frauds*—not even mentioned—was bill parcels—sufficient to take it out of the statute. 11 *Mass.* 6; 2 *M. & S.* 286;—no case has been found where *constructive* delivery held enough under statute of frauds—*column of granite*—civil law—two kinds of delivery. *Wood's Inst.* 99, 100;—that law had nothing in it like our statute of frauds. *Just. Inst.* (HARRIS) *G.* 3, *tit.* 24, *note*; *cites* 7 *Wend.* 389;—nothing to do with statute frauds—contract for work and labor under modern cases—work done and payment made—and question not made. 13 *Pick.*;—don't help this case. 2

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Bing. ;—plaintiff must *free the case from all doubt*, or safest to adhere to statute. 

P. T. Woodbury, attorney, and

Jno. D. Willard & J. A. Spencer, counsel, for def't in error.

First. There was a sale and delivery. The parties were standing by the lumber, and after some chaffering about a bargain, Shindler makes an offer for the lumber; Houston accepts it, and says, “the lumber is yours.” Shindler assents to this—assents to the proposition that the property is transferred to him—and directs Houston how and where to get his pay. The parties separate without any provision to meet again—Shindler going off immediately to New-York. Before going, however, he further recognizes his own title to the property, by directing his agent in Troy to pay for it—(*see printed case, folios 28 and 30.*) There was all the delivery necessary in the case of cumbersome articles. In *Bates v. Conkling*, (10 *Wend.* 389,) the supreme court held, considering the nature of the articles, that piling up boards, and giving notice to the purchaser, was a sufficient delivery, and transferred the title—although the purchaser never moved the property, and it did not appear that he or his agents ever saw it. So, when the vendor takes the vendee in sight of ponderous articles, such as a column of granite, or logs lying in a boom, it amounts to a delivery, without any change of position of the articles. (2 *Kent's Com.*, 500, 501, 4th ed.; *Chaplin v. Rogers*, 1 *East*, 192; *Jewett v. Warren*, 12 *Mass. Rep.* 300.)

Second. But it is said, something remained to be done. The testimony does not show that anything remained to be done; every thing which the vendor had to do was done—the sale was complete. (*Chitty on Con.* 375; 2 *Kent's Com.*, 492.) We admit, that although a contract for the sale of goods be complete and binding in other respects, the property in them remains in the vendor, and they are at his risk, if any material acts remain to be done before the delivery, either to distinguish the goods, or ascertain the price, unless there is an understand-

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ing to deliver before the material thing is done. This is the whole doctrine of the cases of *Outwater v. Dodge*, (7 Cowen, 85;) *Ward v. Shaw*, (7 Wend. 406;) *Fitch v. Losee*, (15 Wend. 221;) *Downs v. Ross*, (23 Wend. 270;) *Downer v. Thompson*, (2 Hill, 137.) But the circumstances of each of those cases differ materially from the present one. In each of them, some material thing remained to be done to the goods, before legal delivery could take place—such as separating the goods off from a large quantity, and appropriating them to the vendee, or weighing, counting, or otherwise ascertaining the price, quantity, or quality. The court, therefore, held that there had been no legal delivery in consequence thereof—something remained to be done before there could be a delivery. Not so in this case. Here, every thing material to be done by the vendor, was done, when Houston says “the lumber is yours,” and Shindler indicates the method of payment, to which Houston assents, and the parties separate not to meet again. The lumber had been previously measured on board the boat, and was at this time on the dock. The rate at which it was sold, was fixed in the conversation; the quantity had already been ascertained by the inspection. Not only did nothing *material* remain to be done, but *nothing whatever* remained to be done. It will not be pretended the mere arithmetical ascertainment of the aggregate price, (the quantity having been previously ascertained, and the price per foot agreed on,) was such a material thing remaining to be done, as to prevent a transfer of the property. It was held by TINDAL, C. J., in *Tansley v. Turner*, (2 Bing. N. C. 151,) that the property in trees passed to the purchaser, although the sum total of the cubical contents had not been ascertained, the trees having been marked by the purchaser, and the cubical contents of each ascertained. All the judges concurred. In the case before the court, the measurement and computation had gone further, and were complete, and the whole quantity ascertained. (*See stipulation as to the facts of measurement, &c., printed case, fol. 24.*)

☞ *Brown on Sales*, 44—to put it in a deliverable state. 13 Pick. 183, cites above. ☞



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Third. But it was urged on the trial, that the delivery of the inspector's bill, was a condition precedent to the vesting the right of property in Shindler. If so, it must have been because the parties stipulated for it by their agreement; and that there was any agreement or understanding of the kind, is wholly unsupported by the proof.

After Houston said "the lumber is yours," Shindler told him "to go to the inspector, and get the inspector's bill of it, and carry it to Mr. House, and House would pay for it; for he (Shindler) was in a hurry to go to New-York that afternoon."

What is there here which shows that the parties had agreed that the delivery of the bill should be a condition precedent to the transfer of the property? It was to be a condition precedent only to the payment.

Fourth. The jury have found whether or not anything remained to be done by the vendor, after the conversation sworn to by Patterson; at all events, it was the intention of the parties to consider the lumber delivered at that time, and that nothing further was agreed, or contemplated being done, to pass the title and possession of the lumber. This point was distinctly presented to them by the recorder, and found by them in favor of the defendant in error. (*See printed case, folio 34.*)

 3 J. 414, to show question for jury. 

It will not be denied, that, even if anything remained to be done, which might otherwise have been necessary, in order to transfer the title, it was competent to the parties to waive this as a condition precedent, and to make a delivery if they so agreed; and that whatever remained to be done, might be done after the sale and delivery. (*Riddle v. Varnum*, 20 *Pick.* 280; *Macomber v. Parker*, 13 *Pick.* 182.)

The jury also found that there was a delivery of the lumber, and an acceptance of the same. (*See printed case, fol. 34.*)

It was a question of *fact*, peculiarly within the province of a jury to decide; and their finding will not be disturbed, if there was any evidence to support it.

Fifth. The recorder certainly decided right, in submitting

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the questions of fact to the jury, which he did submit to them ; but if not, Shindler (the original defendant, but plaintiff in error,) has no right to complain. If the recorder erred at all, it was in submitting to the jury *any* question of fact, instead of charging them that Houston (the plaintiff below,) was entitled to their verdict.

Sixth. The judgment of the supreme court should be affirmed.

DECISION.—*Judgments reversed, with venire de novo, by the supreme court—costs to abide event. For affirmance—JEWETT, Ch. J., and GRAY, J. For reversal—BRONSON, JONES, GARDINER, WRIGHT, JOHNSON and RUGGLES, JJ.*

NOTE.—GARDINER, BRONSON and WRIGHT, judges, delivered written opinions, in which they substantially *held*,—That the statute of fraudulent conveyances and contracts pronounced this agreement, when made, void, unless the buyer should “accept and receive some part of the goods.” The language is unequivocal, and demands the action of both parties ; for acceptance implies delivery, and there can be no complete delivery without acceptance. The defendant, however, said nothing, and did nothing subsequent to the agreement, except through his agent, to repudiate the contract. There was consequently no evidence of delivery.

Mere *words* of a contract, unaccompanied by any act, can not amount to a delivery. A writing must be made—part of the purchase money must be paid, or the buyer must accept and receive part of the goods. Here there was no delivery, either actual or symbolical.

There must not only be a delivery by the seller, but an ultimate acceptance of the *possession* of the goods by the buyer. And this delivery and acceptance can only be evinced by unequivocal acts, independent of the proof of the contract.

Reported 1 Comstock, 261.

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SPARROW, plaintiff in error, *agt.* KINGMAN, defendant in error.

Questions discusseæ.

1. Whether the evidence in this case (action for ejectment for dower,) showed that the husband of defendant could have had no estate or interest in the premises in question, beyond that of a term of years, under a lease of surplus waters; and, therefore, the plaintiff was not entitled to dower?

2. Whether the actual possession and use of the premises, by the plaintiff's husband—building mills thereon, and claiming to be the owner for four years—proved such an estate or seizen in the husband, as entitled her to dower therein?

3. Whether, where the defendant held the premises in question under a *quit claim deed* from the plaintiff's husband, and was in possession, he was *estopped* from showing that plaintiff's husband had no title?

4. Whether the offer of defendant to show that plaintiff's husband never had any title to the premises in question, was properly excluded?

THIS was an action of ejectment, tried at the Erie circuit, before the Hon. N. DAYTON, circuit judge, January, 1846.

The premises are described in the declaration, as follows: One sixth part of all that certain piece or parcel of land, situate in the village of Black Rock, in the county of Erie, known as seventy feet, commencing at the point where the Black Rock dam adjoins the pier of the ship lock; thence westerly on the said dam, seventy feet; thence at right angles with the southerly line of the said dam, to the north line of the said dam; thence easterly to said pier; thence southerly along said pier to the place of beginning, with the appurtenances thereunto belonging, as her reasonable dower, as the widow of George G. Kingman, deceased, late the husband of the said Elizabeth Kingman.

On the trial, the marriage of the plaintiff with George G. Kingman, and his death, were admitted.

The plaintiff then proved by Amos Root, that he knew the Erie mills—that he is a miller by occupation, and has charge of said mills—he knew Kingman in 1837, 1838, 1839 and 1840.

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Kingman & Durfee built the Erie mills, and occupied them together in those years, claiming to be the owners of the premises ; and the premises in the declaration were the premises on which the Erie mills were built ; that Sparrow, the defendant, was in possession of the mills in June, 1844, and has been ever since that time.

The defendant then proved, on the *cross-examination*, that the Black Rock dam was a dam in the Niagara river, connecting the main shore with Squaw Island ; that vessels of a large class are accustomed to go to the Erie mills, both above and below the dam, and lade and unlade, and that it is part of the public works connected with the Erie canal.

The plaintiff's counsel then read, from volume 63 of the records of deeds, in the Erie county clerk's office, at page 136, a quit-claim deed, from Kingman to S. J. Holley, covering the premises in question. This deed was without date, as to the particular day in February, 1841, but was acknowledged on the 16th February, 1841.

The plaintiff also read from volume 68, of the same records, at page 70, a quit-claim deed from Philo Durfee to Sparrow, the defendant, dated August 13, 1841, conveying the equal undivided half of the same premises.

She also read from the same volume, at page 68, a quit-claim deed of all the said described premises, from Sparrow and Holley, to Ira B. Cary, dated April 22, 1842.

It appears from the case, that the two last mentioned deeds contained a clause, as follows :—" The intention hereof, being to grant and convey to the parties of the second part, the one-fourth of all the land and water power, right, privileges and franchises, hereditaments, powers and appurtenances, heretofore granted and conveyed to Philo Durfee and George G. Kingman, in and by a certain deed, executed by Lewis F. Allen, William F. P. Taylor and Isaac S. Smith, dated on or about the 29th day of June, in the year 1837, and recorded, &c. And also the Erie mills, and warehouse connected therewith."

The plaintiff proved that Sparrow was in possession of the

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Erie Mills, as tenant of Ira B. Cary, his landlord, under a lease.

The plaintiff here rested.

The defendant then called upon the plaintiff to read the deed from Allen, Smith & Taylor, referred to in the deeds she read. The plaintiff declined.

The defendant's counsel then called upon the court to decide that the plaintiff was bound to read the deed, as part of her case, as it was referred to in some of the deeds read by her.

The court declined so to decide, and the defendant excepted to the decision.

The court said the defendant might read the deed from Allen, Smith & Taylor in evidence, without prejudice to his right to move for a non-suit on the whole evidence, after it was read; and it was read, as follows:

This indenture, made this 29th day of June, in the year 1837, between Lewis F. Allen, William F. P. Taylor & Isaac S. Smith, of the first part, of the town of Buffalo, in the county of Erie, by virtue of the trusts, powers and authority conferred upon them, by and under the conveyance creating the association known as the Niagara City Association, and George G. Kingman & Philo Durfee, of the same place, of the second part, witnesseth: that the said parties of the first part, in consideration of \$3,500, have granted, bargained, sold, conveyed, assigned and transferred, and by these presents do grant, bargain, sell, convey, assign and transfer unto the said parties of the second part, their heirs and assigns forever, "All that certain piece or parcel of land, situate in the village of Black Rock, in the said town, known as seventy feet, commencing at the point where the Black Rock dam adjoins the pier of the ship lock; thence westerly, on the said dam, seventy feet; thence at right angles with the southerly line of said dam, to the north line of the dam; thence easterly to the said pier; thence southerly along said pier, to the place of beginning; it being intended hereby, to grant the one-fourth of the said dam, if the same shall exceed seventy feet, above described; and if

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not, then to convey the said seventy feet only, together with a water power sufficient for nine run of stone, whether the said one quarter shall be equal to that water power, or not; and in case the water power, when used in equal proportions on the said dam, shall exceed for one-fourth of the said power, for the said nine run, then the said parties of the second part shall have, hold and enjoy all the water power which shall appertain to the said one-fourth of the said dam, to have and to hold the said premises, together with the water power hereby granted to the said parties of the second part, and their heirs and assigns forever, as fully and as perfectly as the same were conveyed by the state of New-York, and as the same now exists, excepting and reserving from the premises hereby conveyed, thirty feet in front of any mill which the said parties of the second part shall erect, and in extension of the street as a public highway. Provided always, and it is hereby expressly understood and agreed between the said parties, that the said parties of the second part, or their heirs or assigns, shall not create any erections southerly of a line drawn from the south end of the ship lock, running westerly in a line parallel with the said dam, nor shall they create any erections north of a line running parallel with the above mentioned line, and distant therefrom 150 feet; and the said parties of the second part, in consideration of the said grant, do hereby, for themselves, their heirs and assigns, covenant and agree to and with the said parties of the first part, and their legal representatives, that they will at all times hereafter pay off and discharge the one-fourth part of the rent reserved by the state of New-York, on the lease of the said water power, on the said dam.

In witness whereof, the said parties have hereto set their hands and seals, the day and year first above written.

In presence of

H. J. STOW.

L. F. ALLEN, [L. S.]

W. F. P. TAYLOR, [L. S.]

ISAAC S. SMITH, [L. S.]

G. G. KINGMAN, [L. S.]

PHILO DURFEE, [L. S.]

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Erie County, ss.

On this 26 1837, before me came Horatio J. Stow, to me known, and he being by me duly sworn, said that he knew Lewis F. Allen, William F. P. Taylor, Isaac S. Smith, George G. Kingman and Philo Durfee, the persons described in, and who executed the within instrument, and that he saw each of them execute the same, and that he set his name thereto, as a witness to its execution, and that he resides in the city of Buffalo.

D. TILLINGHAST, *Sup. Court Com'r.*

The defendant then moved for a non-suit, on the ground that all the evidence, taken together, showed that Kingman had no estate in the premises of which his wife could be endowed.

The court overruled the motion, and the defendant excepted to the decision. *

The defendant then opened his defence, and offered to show, to establish that Kingman never had an estate, of which his wife was dowable,

1. That all the right Kingman ever had, was a right to draw water from Black Rock harbor, or the Black Rock dam, as the assignee of the lessees of the state of New-York, of the surplus water to be drawn from said harbor, under a sale of that right, made by the canal commissioners, in 1826, under the law relating to the Erie and Champlain canals, at an annual rent, to be paid to the state.

This evidence was objected to by the plaintiff, and overruled by the court, and the defendant excepted to the decision.

2. That Kingman never had any title to the premises.

This evidence was objected to by the plaintiff, and overruled by the court, and the defendant excepted to the decision.

3. That the defendant held a mortgage in fee of the premises in question, of Kingman & Durfee, to Dows & Cary, that had become forfeited, upon which Kingman had written an endorsement, that his interest was only a leasehold estate of 999 years.

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This evidence was objected to by counsel for the plaintiff, and rejected by the court. The defendant's counsel excepted to the decision.

The court then decided, that as Kingman, when in possession, had, by his deed to Holley, assumed to convey a fee, and as the defendant held under that deed, he was bound by it, and was estopped from setting up that Kingman had not an estate of which his wife was dowable, and that upon the evidence given, the plaintiff was entitled to a verdict.

The defendant's counsel excepted to such decision, and every part thereof.

The jury found a verdict for the plaintiff, and the judge signed and sealed the bill of exceptions, and directed the cause to be carried to the supreme court, without being heard by him on the bill of exceptions.

The supreme court, in July term, 1846, sustained the verdict, and gave judgment for the plaintiff.

The defendant brought error for review, to the court of errors; and the proceedings were subsequently transferred to this court.

W. L. G. Smith, attorney, and

H. S. Dodge, counsel, for plaintiff in error.

First. The evidence of the plaintiff below, (*fol.* 23, *pp.* 8, 9,) and the deeds to Holley and Sparrow, (*p.* 9,) and of Allen and others, (*pp.* 11 and 12,) showed that Kingman, the husband of defendant, could have had no estate or interest in the premises in question, beyond that of a term of years, under a lease of surplus waters, executed by the canal commissioners, pursuant to the statutes; and, perhaps, a license to erect mills on the public dam.

And the non-suit asked for on the trial, (*pp.* 12, 13,) ought to have been granted. (*See the statutes collected in 1 R. S., 3d ed., pp.* 261, 263, 266.)

Sparrow *agt.* Kingman.

Second. The circuit judge erred in excluding the evidence offered to show that Kingman never had any estate in the premises. (P. 13.)

1. The acceptance by Holley of Kingman's quit-claim deed-poll to him, did not estop him, or those claiming under him, from showing that Kingman had no title. An estoppel by acceptance of possession is only in *pais*, and, therefore, only applies to a lessee or other grantee, who is under obligation to restore the possession. (*Co. Littleton*, 352, *a*; *Watkins v. Holman*, 16 *Peters*, 25; *Small v. Proctor*, 15 *Mass. R.* 499; *Osterhout v. Shoemaker*, 3 *Hill*, 518.)

☞ Grantee holds adversely to the grantor. And no estoppel, except where the grantee is bound to restore the possession.

Mere acceptance of the deed creates no estoppel—except where possession to be restored. Accepting deed is only an estoppel *in pais*—not by deed—when possession restored, the estoppel gone—all the cases agree. ☞

An acceptance of such a deed, does not even affect the character of the grantee's previous adverse possession. (*Northrup v. Wright*, 7 *Hill*, 476.)


2. There can be no estoppel for want of mutuality. Kingman himself would not have been estopped, by his quit-claim deed, from showing that no title passed by it. (*Jackson v. Hubbell*, 1 *Cow.* 616; *Jackson v. Bradford*, 4 *Wend.* 622; *Jackson v. Waldron*, 13 *Wend.* 178; *Bac. Leases o.*)

☞ Grant without warranty don't estop grantor from setting up an after acquired title. Then grantee not estopped, because estoppels must be mutual. ☞

These cases show that an after acquired estate passes by estoppel, only when there are covenants of warranty, &c., and by way of avoiding circuity of action.

3. His widow would not be estopped, even if he had covenanted; and, therefore, she cannot estop the grantee. (2 *Smith's Leading Cases*, p. 438; *Jewell v. Harrington*, 19 *Wend.* 471; *Gaunt v. Wainman*, 3 *Bing. N. C.* 69.)

☞ Notes to 2d ed., cites all the cases—*directly in point.*

17 *Wend.*; the first case which establishes the principle—cases there cited, do not support the position. 1 *Caines*, 186; proof defendant holds under husband, *sufficient in first instance*. 6 *J.* 290; KENT, Ch. J.—*dictum* to this effect—but case was that wife might recover dower of equity of redemption. 2 *J.* 119; nothing more than 1 *Caines*. 7 *J.* 278; like 6 *John*. 9 *J.* 344; court say estopped—but case nothing more than 1 *Caines*. 15 *J.* 21; 1 *Caines*—nothing more. 5 *C.* 299; *do.* 12 *W.* 65; first case asserting this doctrine, *held*, estopped from saying husband was an alien. WM. JONES, 317, only authority cited for this doctrine, by KENT and others—*argument of counsel*, only—[no—Judge JONES]—words are—Jones put Taylor's case, tenant for years makes feoffment and dies, widow brings dower—tenant pleads, husband not seized, and court all against him because feoffee *got a fee*. Though a tortious fee, it was a fee—not a word about estoppel. 

4. The opposite doctrine was held by the supreme court, on the authority of *Bowne v. Potter*, (17 *Wend.* 164.)

Sherwood v. Vandenburg, (2 *Hill*, 303,) adds nothing to the former case, there being another point decisive of that case.

And it is admitted by Mr. Justice COWEN, at *p.* 309, and afterwards by Ch. J. BRONSON, in 3 *Hill*, at *p.* 519, that the rule is against principle.

5. The cases cited in *Bowne v. Potter*, as having settled the point in this state, will be found on examination to decide a very different point; some of them merely showing that proof of the husband's prior possession was sufficient *prima facie* evidence of seizin; and the others that a widow is entitled to dower against persons deriving a *tortious* or *defeasible* freehold and inheritance from the husband.

And this is the doctrine of the case cited by Sir W. JONES "*arguendo*" in his reports, *p.* 317, and which is the foundation of all the subsequent *dicta*.

Third. The circuit judge erred in excluding the evidence offered, to show that Kingman had an estate for years, or some other estate not of inheritance. (*P.* 13.)

1. The case of *Bowne v. Potter*, and the case of *Sherwood v.*

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Vandenburgh, were cases where the offers were to show *no title* in the husband, not to show a *less estate*, and if they are conceded to be law, they do not determine this question.

2. There is no estoppel where an interest passes ; in other words, it may always be shown that a less estate passed than the estate mentioned in the deed, although it be an indenture. (*Treport's Case*, 6 Rep. 146 ; 2 *Williams' Saunders*, 418, note 1 ; 2 *Smith's Leading Cases*, 438, §§ 9, 457, 463, 470 ; 4 *Kent*, 98.)

Fourth. But the foundation of the argument to prove an estoppel, *i. e.*, in the words of the circuit judge, (*p.* 13,) that "by the deed to Holley, Kingman *assumed to convey a fee*," wholly fails in the present case.

1. The deed is a mere quit claim and release, (*p.* 9,) and therefore only purports to convey the right that the grantor had, and for that reason never could operate as an estoppel. (*Right v. Bucknell*, 2 B. and Ad. 278.)

At most, the deed merely affirms that Kingman was entitled to a fee, *or some other estate*, and there could be no estoppel from such an uncertain recital, if it had been made expressly. (*Right v. Bucknell*, *ubi supra*.)


2. If there ever were any doubt of this point, there can be none since the provisions of the R. S. (1 R. S. 738, 739, §§ 136, 140, 142, 143, 144, 145 ; also 1 R. S. 748, §§ 1, 2.)

The deed in this case was made in 1841, (*p.* 9.) In the cases of *Bowne v. Potter* and *Sherwood v. Vandenburgh*, the deeds were executed before the revision of the statutes.


3. The deed, therefore, from Kingman to Holley, was intended and assumed to pass whatever estate and interest Kingman had, without defining it, and must be read as if it had expressly so stated its object.

And the statute (1 R. 739, § 143,) expressly prohibits the construction to the deed given by the circuit judge.

The judgment of the supreme court rendered, notwithstanding the exceptions, ought to be reversed, and a *venire de novo* awarded, with costs to abide the event.

 *Reply.*—Not a rule of property, in this case. 13 W.

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546 ; 8 *Metc.* 290 ; as to 12 *W.*—got a good title, tho' de-feasible—and so widow shall have dower—so 12 *W.* not against us. 

Greene & Sheldon, attorneys, and
N. Hill, jr., counsel, for defendant in error.

The plaintiff, Elizabeth Kingman, claims her right to dower in one-sixth part of the premises called the Erie mills, at Black Rock, described in the declaration at *page 5, folio 10*. She claims it as the widow of George G. Kingman, deceased, who, together with Philo Durfee, bought and owned the premises, and who, in 1837, built the Erie flouring mills, and possessed and occupied them during that year and 1838, 1839 and 1840, claiming the ownership. (*Page 8, fol. 23.*)

Erastus Sparrow is in possession as the tenant of Ira B. Cary, his landlord, under a lease, and therefore made defendant on the record. Ira B. Cary, his landlord, derives his possession, and title to one half of the premises, from George G. Kingman, the plaintiff's husband, and to the other half from Philo Durfee.

Kingman conveyed his half to Samuel J. Holley, and Durfee his half to Erastus Sparrow, and Sparrow and Holley conveyed to Cary. (*Page 9, fol. 25.*)

 3 *R. S.* 595 ; revisers notes, shows statute not intended to be used as now attempted to use it. Defendants I—All the cases cited in 17 *Wend.* are misapprehended. 

First. The actual possession and use of the premises by the plaintiff's husband, building the Erie mills upon them, and claiming to be the owner in 1837, 1838, 1839 and 1840, proved such an estate or seizin in the husband, as entitles her to dower therein.

“The rule is, that the same evidence of seizin (or estate,) which would entitle the heir to recover in ejectment, will sustain an action for dower.” (5 *Cowen*, 599.)

“And in such case, the seizin (or estate) of the deceased, is proved by showing his actual possession of the premises, or by

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proving his receipt of the rent from the person in possession. This is presumptive evidence of seizin (or estate) in fee, and sufficient till the contrary appears." (2 *Phillips' Ev.* 282; sanctioned in *Jackson v. Walter*, 5 *Cow.* 301; see same rule in 1 *Caines*, 190; *Embree v. Ellis*, 2 *John.* 123.)

"The ordinary proof of seizin (or estate) in fee, is actual possession." (*Jacob's Law Dict. Seizin*; *Co. Litt.* 152.)

Dower follows such a seizin (or estate.) (2 *Blackstone's Com.* 134.)

"Possession of land with a claim of title is *prima facie* sufficient evidence of seizin (or estate) in fee, even to sustain the demandant's claim in a writ of right. The seizin is proved by showing his actual possession of the premises." (*Carpenter v. Weeks*, 2 *Hill* 341; *Sherwood v. Vandenburg*, 2 *Hil*, 303; *Bowne v. Potter*, 17 *Wend.* 164.)

The objection of proving the deed at page 9, folio 25, in connection with the seizin of the plaintiff's husband, is to show that the defendant's possession is from Kingman, and that he holds under Kingman's title.

Second. The defendant's motion for a non-suit was rightfully denied. (*Page 12, fol. 41.*)

The authorities above quoted, show the plaintiff was entitled to dower. The defendant's counsel chose to read the conveyance in fee of William F. P. Taylor, Lewis F. Allen and Isaac S. Smith, dated June 29, 1837, to Kingman & Durfee, of the premises in question, thus adding, to the husband's actual seizin, the strength of a paper title in fee.

Upon these premises, the Erie mills and warehouses had been erected by Kingman & Durfee, and the possession and title of the whole conveyed to the landlord of the defendant.

Did such proof entitle the defendant to a non-suit?

Third. The court ruled correctly that the defendant (or Cary his landlord,) is estopped from denying the estate (or seizin) of the plaintiff's husband, inasmuch as he is in possession under the deed from Kingman, and holds by the same title that Kingman did. (*Page 13, fol. 44.*)

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The defendant's counsel offered, at *page 13, folio 42*, in order to establish that Kingman never had an estate of which his wife was dowable, to show :

1. That all his right was a leasehold right to the water privilege granted by the state.

2. That he never had any title to the premises.

3. That he made his written endorsement upon the mortgage in fee of the premises in question, which Kingman and Durfee had executed to Dows and Cary, that his interest was only a leasehold interest of 999 years.

It is enough to remark that the 1st, if proved, would only have shown the water privilege, a leasehold estate; whereas, Kingman and Durfee had erected, on land conveyed to them by the deed of June 29, 1837, in order to enjoy the right to draw the water from the Black Rock dam, extensive and costly mills, and a warehouse. (*See Root's testimony, p. 8, fol. 23; and the description of the property in the deeds conveying to Cary, p. 9, fols. 26, 27, 28, 29, 30, 31, 32 and 33.*)



And as to the 3d, Kingman's endorsement on the mortgage in fee, could not affect his wife's right, where his mortgage deed did not.

The 2d is a mere repetition of the general offer at *folio 42, page 13*, to show that Kingman never had an estate of which his wife was dowable. Although it is denied that what was in fact offered in evidence by the defendant's counsel, did tend to show it, still, what the defence attempted was, to prove that Kingman had no such title as entitled the widow to her dower in the Erie mills.

It is claimed that Cary, (the landlord and the real defendant,) who derives both his possession and his title from the plaintiff's husband, and who is enjoying the *whole* of the estate under him, can bar the widow's right to the possession and enjoyment of the *portion* the law gives her out of the *same* estate, by proving that Kingman, the common source of the rights of *both*, did not, in fact, have any such interest or title while he lived. Can *he* debar her of the possession and enjoyment of the portion that belongs to her by the *same*, or as *good* a title as his

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own to his portion, on the ground that he can prove that Kingman, and therefore, neither of them, had no title? Good or bad, she has the same right to her's that he has to his, and he has none whatever to her's. (*Sherwood v. Vandenburg*, 2 *Hill*, 303; *Bowne v. Potter*, 17 *Wend.* 164; *Davis v. Darrow*, 12 *Wend.* 65; 5 *Cow.* 301; *Embree v. Ellis*, 2 *Johns. Rep.* 123; *Hitchcock v. Harrington*, 6 *Johns. Rep.* 291; *Collins v. Torrey*, 7 *Johns. Rep.* 279; *Hitchcock v. Carpenter*, 9 *Johns. Rep.* 344; *Dolf v. Bassett*, 15 *Johns. Rep.* 21; 1 *Caines*, 190; 2 *Greenleaf*, 226; 6 *Greenleaf*, 243; 3 *B. Munroe*, 619, *same in principle*; 1 *B. Munroe*, 290; 1 *Shepley*, 216; 4 *Dana*, 479, 464; 1 *Meigs*, 3.)

 Assumed on trial that deeds conveyed a fee—judge so said in his decision—deeds were there—not put in case—but, can't now say anything but a fee—Kingman in possession conveyed in fee—so precise case of 1 *Caines*. If all erroneous, have been acted on for one-half century as a rule of property;—now too late to question—*facit error communis jus. Noy's Max.* 32; 1 *S. & R.* 102, 105, 106; *Broom's Max.* 99; 5 *Cr.* 32; 23 *W.* 336, 340, 341; *Stare decisis*, 4 *Just.* 240; 1 *Peters' C. C.* 443. 

DECISION.—*Judgment reversed, with venire de novo, by the supreme court, costs to abide the event. For affirmance*—BRONSON, J. *For reversal*—JEWETT, Ch. J., RUGGLES, JONES, JOHNSON, WRIGHT and GRAY, JJ. GARDINER, J., having been engaged professionally in the cause, gave no opinion.

NOTE.—It was *held* by WRIGHT, J., that he was content to place his vote for reversal on the distinct ground that, in an action for dower, the grantee in fee of the husband is not concluded from affirmatively controverting the seizin of the latter.

JEWETT, Ch. J.—*Held*, that the plaintiff was not entitled to dower in any other lands than in which her husband, during marriage, was seized of an estate of inheritance; and that when she claims dower, the defendant is at liberty to show, in his defence, that her husband was not, during the marriage, seized of such an estate.

The court, in this case, were not authorized to say that Kingman assumed, by his deed (quit-claim,) to convey a fee; the clear intent, as well as expression of his deed, was to convey only what interest or estate he then had in the premises.

Slocum *agt.* Closson and Mosher.

(*This decision overrules the principles settled by a series of cases determined by the supreme court, from Bancroft v. White, 1 Caines, 185, to Sherwood v. Vandenburg, 2 Hill, 303.*)

BRONSON, J., *dissenting*, held that, as to one half of the Erie mills, the defendant derived his title and possession from George G. Kingman, the plaintiff's husband; and still held under that title. So long as he thus held, he was estopped from denying the seizin of the husband, in an action brought by the widow to recover her dower. (*Citing authorities.*) Questionable as he thought this doctrine was at the first, it had prevailed too long in this state to be now overturned by a judicial decision. If there was any good reason for changing the rule, the change should be made by the legislature, and not by the courts. So long as those claiming under the husband have not been disturbed in the enjoyment of the property, there was no very good reason for allowing them to defeat the widow's claim to dower, by setting up an outstanding title which might never be asserted; and the current of adjudication had not carried the estoppel beyond cases of that description.

Reported 1 Comstock, 242.

SLOCUM, appellant, *agt.* CLOSSON & MOSHER, respondents.

Questions discussed.

1. Whether, on a bill by Slocum for the *specific performance* of a written agreement, under seal, to convey a farm of land by Closson, one of the respondents, to him, there was proof of a prior valid contract between Closson and Mosher, to sell the farm to Mosher? Or, whether the latter contract amounted to any thing more than a *negotiation*—a *proposal* for a sale merely?

2. Whether the written agreement to Slocum was obtained from Closson by unfair and deceptive representations, and with a knowledge, and in violation of a previous parol agreement or understanding, between Closson and Mosher, that Mosher was to have the farm?

3. Whether Mosher, having purchased and taken a deed of the premises of Closson, with knowledge of the previous agreement between Slocum and Closson, was affected by that knowledge, so that his deed should be set aside, or he compelled to join with Closson in the specific performance?

ON the 9th of September, 1833, Joseph Slocum, the appellant, filed his bill of complaint in the court of chancery, before the chancellor, against Isaac Closson and Joseph P. Mosher,

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the respondents, for the specific performance of an agreement alleged to have been made by said Isaac Closson with said Joseph Slocum.

The agreement, as set out in the bill, was dated the 11th June, 1833, made between Isaac Closson, of Schaghticoke, of the first part, and Joseph Slocum, of the village of Syracuse, of the second part; for the consideration of one hundred dollars, Closson contracted, and agreed to sell to Slocum, the equal undivided half part of a farm, situated in the town of Schaghticoke, county of Rensselaer, of which Robert Closson died seized, (giving the boundaries,) containing about two hundred and fifty acres.

The said Closson agreed to execute and deliver to the said Slocum a warranty deed for said land, upon condition that Slocum, his heirs, or assigns, paid to the said Closson, his heirs, or assigns, for the same, the sum of thirty dollars for each acre, in one half of said farm, which was to be surveyed. It being then supposed that said farm contained two hundred and fifty acres, the half of which would be \$3,750, of which \$100 was paid in hand, and the remaining \$3,650 to be increased or diminished, as the half of said farm should overrun or fall short of one hundred and twenty-five acres, to be paid by the 1st September next. The said Slocum, for himself, his heirs, executors and administrators, covenanted and agreed to and with said Closson, his heirs, and assigns, that said Slocum would pay the said several sums as they became due, without any deduction of taxes or assessments whatever. And it was further agreed, that if default be made in fulfilling the agreement, or any part thereof, on the part of said Slocum, then said Closson, his heirs and assigns, should be at liberty to consider the contract as forfeited and annulled, and to dispose of the said land to any other person, in the same manner as if the contract had never been made. (Signed, ISAAC CLOSSON, L.S.)

The bill alleged, that a counterpart of the agreement was signed and sealed by Joseph Slocum, and delivered to said Closson. Also that said Slocum, at the time of executing said agreement, paid to said Closson the sum of one hundred dol-

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lars, as a part of the consideration to be given as aforesaid. That Slocum, in expectation that a deed would be executed to him by said Closson of said premises, pursuant to the terms of the agreement, went from Syracuse to Schaghticoke in the latter part of the month of August, and notified said Closson that he was prepared and desirous to pay the said purchase money for said land, and to receive a conveyance thereof. That on or about the 27th of August, Slocum requested said Closson, in writing, that he would cause an accurate survey of said premises to be made, or that he would unite with the agent of Slocum in employing a surveyor, and other necessary assistants, to make the survey; and informing said Closson, in case he should decline to comply with said request, he, Slocum, would cause such survey to be made. That Closson, on receiving such communication, stated, in substance, that Slocum could go on and make the survey; that it was not necessary for him to attend. Thereupon the agent of Slocum, on the 30th August, 1833, caused such survey to be made by an experienced surveyor; on which survey it was ascertained that said farm contained two hundred and fifty acres only. That Slocum, on the 31st August, caused a deed of said premises to be made out in pursuance of the agreement, and went in search of said Closson, with said deed, and with the purchase money, for the purpose of paying said Closson, and obtaining the execution of said deed. That Closson designedly avoided said Slocum, and attempted to prevent an interview with said Slocum, by passing from place to place, and shut himself up for a time, with the design of preventing said Slocum from tendering him the purchase money, and obtaining the execution of said deed. That Slocum pursued said Closson to the town of Stillwater, and there found him, apparently attempting to conceal himself from said Slocum; and when discovered, said Closson at first refused to suffer said Slocum to enter the house where he was; that then, on the 31st of August, 1833, said Slocum, having with him upwards of \$4,000, offered to pay said Closson the said purchase money of the said farm, in pursuance of the terms of the aforesaid agreement; and informed said Closson that the

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money was then there ready for him to receive, and that said Slocum was desirous to pay it to him, and receive the conveyance of said land. That said Slocum then informed Closson that he had there a conveyance, drawn conformable to the terms of the said agreement, for said Closson to execute, and requested him to execute the conveyance on receiving the purchase money. That, during said conversation, said Closson stated that there was more land in said farm than appeared in the survey made for said Slocum; that thereupon said Slocum offered to pay him for all the land so contracted to be sold, whatever the true quantity should be, and to receive a conveyance of the whole of said Closson's share.

That said Closson wholly declined, and refused to receive said purchase money, or to execute such conveyance, and left said Slocum, apparently attempting to elude the offer of said Slocum. Afterwards, on the 2d September, 1833, said Slocum, by his agent, again attempted to induce said Closson to receive said purchase money, and execute such conveyance, but said Closson could not be found.

The bill charges that said Closson still wholly refused to receive said purchase money, and to execute said deed.

The bill further charged, that on or about the 2d September, 1833, said Closson executed a conveyance of said premises to Joseph P. Mosher, which was recorded on the 3d September, which conveyance was wholly unknown to said Slocum at the time of filing his bill of complaint. Charges that said deed to Mosher was executed and recorded in fraud of said Slocum's rights, and was obtained and received by said Mosher with an intent to defraud said Slocum. That at the time the deed was so executed, the said Mosher, who was the brother-in-law of said Closson, well knew of said bargain and sale to said Slocum, and the payment made on said contract, and of the offer made as aforesaid by said Slocum, to pay the residue of the purchase money, and to receive a deed, in pursuance of his contract with said Closson.

The defendants answered, without oath, and admitted the seizure of said premises by said Closson, in and before the

month of June, 1833. Admitted the execution of the agreement by Closson to Slocum of said premises, as stated in the bill. But alleged that the same was so signed, by the said Closson, by the fraudulent procurement, and false and fraudulent representations of said Slocum. That long before the execution of such agreement, to wit: in or about the year 1828, the said Joseph P. Mosher had applied to Closson to purchase his, said Closson's, share of said farm; that Closson then agreed, or promised, to sell the same to him, but no price was then agreed upon between them, and Closson soon after left the state of New-York for St. Louis.

That while he, Closson, remained in that region of country, and between the years 1828 and 1833 inclusive, said Mosher, in the expectation and belief that he was to purchase and have the interest or share of said defendant, Closson, in said farm; and at the request of said Closson, sent him, from time to time, various sums of money, amounting in the whole to \$500. That in or about the month of March, 1833, Mosher, being desirous to close up the business, and get a conveyance from said Closson, having previously written several times, again wrote to said Closson, enclosing him \$200, and requesting him, without delay, to set his price upon said farm, that the business might be closed. In answer to which, Closson wrote, about the 25th March, 1833, agreeing to take thirty dollars per acre for his share or interest in said farm. That immediately thereafter Mosher wrote to said Closson, accepting said proposition; and also procured a deed of said premises to be prepared for Closson to execute; and caused the same to be sent by mail to Closson, at the same time requesting him to execute the deed and return it to said Mosher, by mail, agreeing to send Closson the residue of the purchase money in a draft, by mail, or to pay, or secure the payment thereof, in such other manner as Closson should direct.

That said last mentioned letters, and said deed, were received by Closson, by due course of mail; and that Closson would have immediately executed said deed, and returned the same by mail, but having made his arrangements for leaving St. Louis

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and returning to the state of New-York, on a visit to said Mosher, concluded to delay the execution of said deed until he arrived at the residence of said Mosher, in Easton, in the state of New-York.

That while said Closson was on his way to said Mosher's, with the intention of executing said deed on his arrival, and having the same in his possession with that intent and purpose, he, Closson, met with said Slocum, and one Wm. B. Slocum, his father, at the village of Syracuse, in the county of Onondaga, N. Y., at which place said Wm. B. Slocum, who pretended to act as an agent for his sons, said Joseph Slocum and one Hiram Slocum, or one of them, but who, as he alleged, was acting for his own benefit and interest, as well as in behalf of his sons, commenced a conversation with said Closson in relation to the purchase by the said sons, or one of them, of the share or interest of said Closson in said farm; that Closson then told both the complainant and Wm. B. Slocum, that he had agreed to sell his share of said farm to Joseph P. Mosher, and that said Mosher had sent him a deed thereof to be executed, which he had with him, and intended to execute it when he arrived at the residence of said Mosher; that both the complainant and said Wm. B. Slocum then averred, and stated to and assured said Closson, that said Mosher did not wish, and did not intend to purchase said Closson's interest in said farm; that said Mosher intended to, and was about to sell his interest in said farm to the said Hiram Slocum; and that said Mosher had suffered the farm, and fences thereon, to remain and be in a ruinous state, for the want of proper and necessary care and husbandry; and urging said Closson, as he and the said Joseph and Hiram Slocum were old friends and school-mates, to sell the same to them. That in consequence of such representations the said Closson, supposing the same to be true—as the said Wm. B. Slocum represented that he had then, within a few days, seen the said Joseph P. Mosher—was induced to receive the said one hundred dollars, and to sign the said agreement, which complainant alleged was for the benefit of Hiram Slocum, or for Hiram and himself. But defendants alleged and

averred that said contract was also, in part, for the benefit of said Wm. B. Slocum.

The answer alleged that said Joseph, Wm. B., and Hiram Slocum, well knew that said Mosher was the owner of the one equal undivided half part of said farm, as tenant in common with said Closson, and had contracted with said Closson for the purchase of his interest.

The defendant, Mosher, alleged that one of the means made use of by said complainant and Wm. B. Slocum, to procure and obtain said contract or agreement from said Closson, was by getting him intoxicated with ardent spirits.

Denied that complainant ever notified Closson that he was prepared and desirous to pay him the purchase money for said premises, and to receive a conveyance therefor; or ever tendered or offered to pay the same; or ever tendered a deed, to be executed by Closson, as alleged.

Denied that complainant, in writing or otherwise, ever requested Closson to have the farm surveyed, as alleged in the bill of complaint; or that complainant ever caused an accurate survey of the same to be made.

Admitted said Closson had refused, and still did refuse, to convey his interest in said farm to complainant, for the reasons before stated in the answer. That Closson, as soon as he discovered the fraud practised upon him, offered to pay back the said one hundred dollars, with interest, which offer was refused by complainant.

Admitted, that on or about the 2d September, 1833, Closson conveyed his interest in said premises to Mosher, and that the deed was recorded on or about the 3d September, 1833. But alleged that such conveyance was in pursuance of the aforesaid agreement, made between said Closson and said Mosher, which agreement was well known to the complainant.

The foregoing contains, in substance, the bill and answer in the cause. The cause being at issue upon a general replication put in by the complainant, an order was, on the 18th May, 1834, entered, requiring the respective parties to produce witnesses.

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[It is impossible to do justice to this case without giving the evidence almost entire, as the decision of the cause necessarily rests upon the construction and weight of such evidence.]

The complainant introduced witnesses, and the depositions were taken as follows :—

On this 26th of May, 1836, personally appeared before me, John J. Hill, an examiner in chancery, *John Wilkinson*, a witness produced on the part of the complainant, who, being duly affirmed and orally examined by the counsel for said complainant, says,—that he resides at Syracuse, in the county of Onondaga, and is thirty-seven years of age : I am acquainted with the complainant in this cause, and am partially acquainted with Isaac Closson, one of the defendants ; but I do not know Joseph P. Mosher, the other of said defendants. On or about the 11th day of June, 1833, I saw Mr. Joseph Slocum, the complainant, and the said Isaac Closson. They came to my office in Syracuse, for the purpose of having an instrument drawn, by which Mr. Closson was to convey a farm in Rensselaer county to Mr. Slocum. I drew the instrument marked as Exhibit I, which the said Closson executed, and delivered to Mr. Slocum, and to which I signed my name as the subscribing witness. There was a counterpart of the same instrument, made at the same time, and delivered to Mr. Closson, which said counterpart was executed by Mr. Slocum, the complainant.

If I remember right, he, the said Isaac Closson, was then on his return from Missouri, where he had been for some time previous, and I think as long as three years previous, as he stated to me. I talked to him a good deal at length about the western country, particularly about that part of Missouri where he had been residing. He told me a great deal about it, and that he was going to return to Missouri. This conversation was had with Mr. Closson while he was in my office, waiting for the papers to be prepared. I do not remember that any other person was in company with Mr. Isaac Closson than Mr. Slocum. He, Mr. Closson, talked more about the bargain than Mr. Slocum, and gave more directions about drawing the pa-

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pers than Mr. Slocum. It was towards night when Mr. Closson and Mr. Slocum came to my office, and the writings were executed before they left. I did not discover that Mr. Closson, at this time, was at all affected with liquor, and I think the conversation I had with him, concerning his travels in the west, &c., was such, that if he had been at all affected by liquor, I should have been able to discover it. I took a considerable interest in the conversation.

The said witness, on being *cross-examined* by the counsel for the defendants, says,—I first became acquainted with the complainant about the year 1824. I think Mr. Slocum paid me for drawing the instruments; whether he paid me at the time, or afterwards, I am not certain; but I think I charged the same to Mr. Slocum. I never saw Mr. Closson before the time he came to my office, to my knowledge, nor have I seen him since.

Ephraim Congdon, being sworn, says,—that he resides in the town of Schaghticoke, in the county of Rensselaer, and is acquainted both with the complainant, and Isaac Closson and Joseph P. Mosher, the defendants in the above suit, and has known them for some years past; that in March, in the year one thousand eight hundred and thirty-two, he, the witness, applied to Joseph P. Mosher for some money, through another person; that on the twenty-seventh day of March, in the year one thousand eight hundred and thirty-two, he received of said Mosher the money applied for, and gave him his, the witness's, note for the same; that when said Mosher counted out said money to him, the witness, he remarked that a part of that money had been sent, by mail, either to St. Louis, in Missouri, or to some of the villages in the vicinity of St. Louis; that he had forwarded it there, directed to Isaac Closson; that the said money had been returned to Mr. Mosher; that when the money was put into the post-office by Mosher, said Closson was west of Missouri, on a hunting expedition, and when Closson returned, the postmaster refused to deliver it to him, supposing that he, Closson, was not the man to whom it was sent, and thereupon the said postmaster returned the same money to said Mosher; the amount so returned was two hundred dollars, as

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he believes; the money was in two one hundred dollar bills; that he, the witness, did not learn from the said Mosher on what account the said money was so sent to said Closson. That the amount of the money which he, the witness, received of said Mosher, was five hundred dollars; that the person through whom he applied for said money was Stephen Batty, of Easton.

William M. Dennis, being sworn, says,—that he resides in the town of Lansingburgh, in the county of Rensselaer, and is acquainted with the complainant, Joseph Slocum, and the defendants, Isaac Closson and Joseph P. Mosher, the defendants in the above suit; that in the month of June, in the year one thousand eight hundred and thirty-three, Isaac Closson, one of the above defendants, called on him, the witness, at his store in Lansingburgh, and stated that he was then on his return from the Rocky Mountains, or St. Louis, or some place at the west; that said Isaac had then with him a gun and a gold watch, which appeared to be new; that he, the witness, then asked him, the said Isaac, how he got funds to buy those articles, and whether he had received any money from Mr. Mosher. Said Isaac then stated to him, the witness, that he had sold his farm to Joseph Slocum of Syracuse, and that said Joseph Slocum had advanced him some money upon it; the amount mentioned he, the witness, does not now recollect. He, the witness, asked him what he got for his farm; and he, the said Isaac, replied, that he got thirty dollars an acre for it. Whereupon he, the witness, remarked to him, that he had sold the farm for less than what it was worth; and said Isaac then told him, that was all he expected to get for it, and all he asked for it; and that he sold it to the first man who offered him his price for it. Witness then asked him if he had entered into writings for the sale of the farm; to which said Closson replied that he had, and that he was to have the cash for the farm on the first day of September, then next ensuing. He, the witness, asked said Isaac why he did not sell the farm to Mr. Mosher; to which the said Isaac replied, that said Mosher wished to purchase it for a less price. The witness thinks that said Isaac stated, that Mr. Mosher wished to buy it for twenty-

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eight dollars for the acre, or had offered him that for it. That at the time of this conversation he, the witness, understood from the said Isaac, that he was then on his way home from the west, and had not then been to Schaghticoke since his return from the west.

William M. Dennis, being *cross-examined* by the counsel for the defendants, says,—that the said Isaac Closson appeared to be addicted to the free use of ardent spirits before he left Schaghticoke and went to the westward; that on his return he, the witness, thought, from his appearance, that the habit of indulging in the free use of spirituous liquors had grown upon him while he was absent at the west, which was five or six years, as he thinks; that it was about one or two o'clock in the afternoon when the said Isaac Closson called on him, the witness, as stated in his testimony on his direct examination, and that said Isaac appeared then to have been drinking spirituous liquors, and appeared to be under the influence of liquor in some degree, but still was so that he could converse freely, and walk without staggering; that he, the witness, was with said Isaac on that day an hour or two, and saw him, during the time he was in his company, drink spirituous liquors two or three times. That in the interview he, the witness, had with said Isaac, as before stated, he, the said Isaac, appeared to be irritated towards Mr. Mosher, and used much harsh language against him; that when witness asked him why he had not sold the farm to Mosher, rather than to a stranger, said Isaac replied that Mosher had not sent him funds as he ought to have done, although he had repeatedly written to him for them, and he supposed that Mosher thought that he would never return; and that Mosher wanted to get the farm for a less price than it was worth, and that he never should have it; that there was money coming to him, the said Isaac, for the rent of the farm; but he, the witness, did not understand from the said Closson from whom said rent was coming; that he, the witness, had an impression upon his mind that he once knew of Mr. Mosher inclosing and sending money to the said Closson, per mail, while he was at the west, but as to this he is not positive; that in

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this conversation, said Closson stated that a deed for conveying the farm to him, the said Mosher, had been sent to him, for him to execute, but he said that the deed was filled up for a less sum than his price, or less than what he thought the farm was worth, and therefore he declined to execute it; that he don't recollect that said Isaac mentioned who the deed was filled up by, or who sent it to him; that he received it a short time before he started to come home; that the witness understood from said Closson that he made the bargain for the sale of the farm to said Slocum, at Syracuse, on his way home; that witness believes that said Closson stated that he saw William Slocum at Syracuse, on his way home, and that he also saw Mr. Fish there, with whom he was acquainted; that he don't recollect that said Closson stated any of the particulars of his said bargain made in Syracuse, further than he, the witness, has already stated.

William M. Dennis, being further examined by the counsel for the complainant, says,—that it is his impression, that in the conversation he had with said Isaac, as before stated, he understood from said Closson that there was money coming to him for the rent of the farm, which he expected to have received through Mr. Mosher; and it is his impression that he then understood, from said conversation, that it was the money coming to him for the rent of the farm of which he complained that Mosher had not sent him; that he, the witness, felt interested for Mr. Mosher, which was the reason of his having so particular conversation with said Closson in relation to his sale of the farm.

Gerrit Fort, being sworn, says,—that he resides in the town of Cambridge, in the county of Washington, and is acquainted with Joseph Slocum, the complainant, and Isaac Closson and Joseph P. Mosher, the defendants in the above suit; that some time in the month of July, in the year one thousand eight hundred and thirty-three, about three or four weeks after Mr. Closson returned from the west, Hiram Slocum, Isaac Closson, and Joseph P. Mosher came to his house in Schaghticoke, where he then lived, and had a conversation relative to the sale of the

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farm of Isaac Closson to Joseph Slocum. They came there in the fore part of the day, remained there more than an hour, and left his house before eleven o'clock in the forenoon. He does not recollect that anything particular was said about the manner in which the bargain was made between said Closson and said Joseph Slocum for the purchase of said farm; but Mr. Closson stated that it was a fair and honorable transaction on the part of said Joseph Slocum. This he stated in the presence and hearing of said Mosher. That as far as he, the witness, discovered, said Closson was then perfectly sober. That he, the witness, during several weeks immediately after said Closson returned from the west, frequently saw said Closson, and that he always, during that time, with the exception of twice, appeared to him, the witness, to be perfectly free from the influence of spirituous liquors. That he does not recollect that there was anything, during the conversation, said of any unfairness on the part of said Joseph Slocum, in relation to the making of the bargain for the sale of said farm to him. There was something said about the situation of the farm, and said Closson said that he wished Mr. Mosher to have the farm. That Mr. Hiram Slocum, whether voluntarily or on the request of some one present, he, the witness, does not recollect, stated that he would write to his brother, Joseph Slocum, and request him to relinquish his bargain for said farm, and that he presumed he would do it on receiving back the hundred dollars which he had paid Closson, and receiving a small compensation, say about fifteen or twenty dollars, for his trouble.

Gerrit Fort, being *cross-examined* by the counsel for the dendants, says,—that at the time of the conversation mentioned in his testimony on his direct examination, he resided about half a mile from the residence of Hiram Slocum, and a little over three miles from the residence of Joseph P. Mosher; that he thinks the said Isaac Closson, Joseph P. Mosher, and Hiram Slocum, did not, at that time, come to his house together, and he thinks that Isaac Closson and Joseph P. Mosher came first, but of this he is not certain; that soon after said Closson and Mosher came, if they came first, Hiram Slocum came; that the

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conversation which he has stated in his testimony on his direct examination, took place when they all three of them were there together. That he does not know that said Hiram then showed a letter from his brother Joseph Slocum ; that he, the witness, had seen a letter before that time, which said Joseph Slocum had written to said Hiram, and heard the said Hiram read the same, or a part of it, but does not recollect that said Hiram showed said letter at the time of said conversation.

Question. Did the said Joseph, in that letter, authorize him, the said Hiram, to make any adjustment or arrangement in relation to said farm ?

The counsel for the complainant objects to the witness answering any inquiries relative to the contents of said letter, without producing ; it and the testimony on that subject is taken, subject to that objection.

The witness says,—that in said letter Joseph Slocum wrote to his brother Hiram, leaving it optional with said Hiram, either to hold on to the contract or relinquish it, just as he saw fit. That at the time of the above conversation, he understood that said Closson, Mosher, and Hiram Slocum had agreed to meet and make an adjustment relative to said farm, and have no difficulty about it, and that they met at his house for that purpose. That he, the witness, understood that before they left his house they, the said Closson, Mosher, and said Hiram, had settled the controversy, and that said Hiram was to write to his brother to relinquish the contract ; but he, the witness, does not know that said Hiram went so far as to say that they had settled the matter ; but that he said he would write to his brother to relinquish the contract, and that he was confident that he would do it, from the instructions which he had given him. That said Hiram said that he had no doubt but that, if his brother had known the circumstances of the place, and that Mr. Mosher wanted it, he would have had nothing to do with it. That after the said Closson, Mosher, and the said Hiram, had come to the understanding in relation to the farm, which he has mentioned, they separated and left his house ; that he, the witness, was never present at any other time when Mr. Closson offered

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to pay back to said Hiram the hundred dollars which said Joseph had paid him, on account of said farm, as far as he, the witness, recollects. That in the conversation between said Closson, Mosher, and said Hiram, which he, the witness, has stated, he, the said Closson, offered to pay back said hundred dollars to said Hiram, and also pay said Joseph for all the trouble he had been put to in relation to said farm. That said Closson, in said conversation, also stated, that if he had not supposed that Mr. Mosher did not want the farm, he should not have contracted with the said Joseph Slocum for the sale of said farm. That he, the witness, has heard said Closson state that he received two letters when he was in St. Louis, one enclosing a deed from himself to said Mosher for said farm, to be by him executed; and also another enclosing to him the sum of two hundred dollars; in which said last mentioned letter said Mosher requested him to come home, as they could settle their business much better if he was at Schaghticoke, than while he was at St. Louis; and said Closson stated further, that he received both letters the 15th of May, and started for home the 17th of the same May; that the letter enclosing the deed was from Mr. Pierson, and the letter enclosing the money was from said Mosher; that said Mosher, in his letter, requested him, the said Closson, if he did not come home, to execute the deed; but the witness cannot say whether this conversation took place at the interview he has mentioned between said Closson, Mosher, and said Hiram, or at some time previous; that he, the witness, understood from said Closson, that on receiving said letters he started for home for the purpose of executing said deed, and closing the business with said Mosher in relation to said farm.

The counsel for the complainant objected to this testimony of a conversation between the witness and said Closson, which the witness could not say took place at the interview between them, the said Closson, Mosher, and the said Hiram, before stated.

That he, the witness, does not recollect that he was ever present at any other time when said Mosher offered to pay

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back to said Hiram Slocum the money his brother Joseph had paid to said Closson, for or on account of said farm; that at the time of the interview before mentioned, William B. Slocum resided in the town of Lansingburgh, where he now lives.

Gerrit Fort, being further examined by the counsel for the complainant, says,—that at the time of the interview between said Closson, Mosher, and said Hiram, of which he has spoken in his testimony, he, the witness, resided on the farm in question in this suit, then owned by said Mosher and Closson; that at said interview was the first time at which he had heard them, the said Closson, Mosher, and Hiram, converse together in relation to said farm; that he, the witness, hired the whole of said farm for five years, for the rent of two hundred and fifty dollars per year, and he hired it for another year at the rent of three hundred dollars, and that he paid said rent to said Mosher; that he paid the taxes on said farm, and was allowed the same in the settlement of the rent; that the last year, for which he paid the rent of three hundred dollars, he had the privilege of sowing a full crop, and of taking it off the next year.

John Wright, being sworn, says,—that he resides in the town of Stillwater, in the county of Saratoga, and is acquainted with Joseph Slocum, the complainant, and Isaac Closson, and Joseph P. Mosher, the defendants in the above suit; that the latter part of August, or the beginning of September, in the year one thousand eight hundred and thirty-three, Mr. Joseph Slocum, the complainant, came to his store in Stillwater; that a short time prior to said Slocum coming to his store, Isaac Closson, the defendant, came to his store with some comrades; that soon after said Closson came, some one then present said, they are coming; whereupon said Closson asked witness for a room, and said that he wished witness not to tell where he was; that said Closson went into a room up stairs, and remained there some time; that after Closson went up stairs, he, the witness, went out of the house; and after he was informed that Closson had gone, Joseph Slocum came to his store, and said Joseph handed him some money to count, which he count-

Slocum *agt.* Closson and Mosher.

ed, and he thinks it amounted to five thousand dollars, but can not be certain as to the amount of said money ; that he thinks said Closson remained in the chamber as much as half an hour ; that it was from fifteen to thirty minutes after Closson went into the chamber, before Hiram Slocum came to him, the witness, at the wood-house, and inquired for said Closson ; that Closson came to his store in the forenoon, and staid there about an hour, before it was said "they are coming," as witness has stated ; that Hiram Slocum came to him, the witness, while he was under the wood-house, and inquired for said Closson, before he, the witness, saw Joseph Slocum, and during the time that the said Closson remained in the chamber, as witness supposed. That he, the witness, declined telling said Hiram where said Closson was, but another person told him that Closson was in the chamber ; whereupon said Hiram asked permission to go into the chamber to see said Closson, to which he, the witness, consented.

John Wright, being *cross-examined*, says—that when said Isaac Closson came to his store, as he has stated in his testimony on his direct examination, he, the witness, thought him to be intoxicated with liquor, and the comrades who came with him were also considerably under the influence of spirituous liquor, and they were very noisy, and, from their appearance and conduct, witness supposed they had set out for a drunken frolic ; that said Closson is an intemperate man, and he, the witness, does not know that he has ever seen him of late years, when he did not think him under the influence of spirituous liquor ; that they were boisterous and noisy after they went up stairs ; that when he, the witness, came into the house from the wood-house, they were still and quiet ; that he, the witness, thinks that when said Closson was at his store, as before stated, he was too much intoxicated to be fit to transact any business of importance ; that witness did not observe whether he did or did not stagger when he walked.

William B. Slocum, being sworn,— The counsel for the defendants objects that his testimony ought not to be taken, on the ground that he is interested in the event of the suit, and for

Slocum *agt.* Closson and Mosher.

the validity of this objection relies on the testimony already taken in the cause, as having proved him to be so interested; and also on the ground that the defendants will give further evidence of such interest. The testimony is taken, subject to this objection.

The witness says,—that he resides in the town of Lansingburgh, in the county of Rensselaer, and that he is the father of the complainant, and is well acquainted with the defendants in this suit. That he, in the month of June, one thousand eight hundred and thirty-three, went with his wife and daughter to Syracuse, on a visit to his son, Joseph Slocum, the complainant, and they arrived there about the tenth day of said June. On the morning of his arrival at said Syracuse, early in the morning, before breakfast, he saw Isaac Closson, the defendant, at said Syracuse. That before he saw said Isaac, his son, the said Joseph, had informed him that there was a man there who called himself Isaac Closson, of Schaghticoke; that afterwards, in the same forenoon, he, the witness, again saw said Closson, and inquired of him where he had been; he said he had been rambling at the west, and had not stopped long in any place. He, the witness, then asked him if he was going back to Schaghticoke to remain there; he said he was going to Schaghticoke to settle his business, but was not going to remain there. The witness then asked him what he was going to do with his farm; he replied that he was going to sell it. That he, the witness, then informed him that it was an excellent time to sell it; that land in Schaghticoke was very high, and that there was a great many buyers; that he, the witness, then observed to him that he supposed his brother-in-law, Mr. Mosher, would buy it. Upon which the said Isaac replied, no; that he should not sell it to his brother-in-law Mosher. Thereupon he, the witness, asked said Isaac what price he asked for said farm; to which said Isaac replied that his price was thirty dollars per acre. That he, the witness, then told said Isaac, that if he was determined that Maria, meaning the wife of said Mosher, should not have it, that he wished him to see his, the witness', son Hiram, as he thought said Hiram, from his owning the farm

Slocum *agt.* Closson and Mosher.

adjoining it, would like to buy it; to which the said Isaac replied that he would see said Hiram, for he should like that some of witness' family should have it, the farm, as they had always been intimate together, and he had rather that they should have it than any one else, provided that they could agree. That the reason of his, the witness', making this statement to said Isaac was, that his son Hiram had before that time told him, that if said farm was to be sold, he should like to buy it, and then have all his land together. Witness further observed, to said Isaac, that he did not think his son Hiram would buy it if, in so doing, he was going to interfere with Mosher and his wife; that he and said Isaac had no further conversation in relation to said farm on that day, as far as he, the witness, recollects; that on the next day afterwards, he, the witness, again saw said Closson, and the witness remarked to him, supposing you and I should make a bargain relative to the farm, in behalf of said Hiram; to which said Isaac made no reply at that time, and he, the witness, asked him no further questions at that time. That he, the witness, again saw the said Isaac afterwards in the same forenoon, when said Isaac told him, the witness, that if Joe, meaning his, the witness', son Joseph, would buy the farm, that he would sell the same to him; to which he, the witness, replied that he could not tell him anything respecting said Joseph buying the farm, and thereupon said Isaac requested him, the witness, to talk with Joseph respecting it; and he, the witness, then told him, the said Isaac, that he would see and talk with said Joseph respecting it, but that he should not see him until noon; and that he, the witness, would let him, the said Isaac, know in the afternoon what said Joseph said, or that he, the said Isaac, might talk with him himself; that at noon, he, the witness, spoke to Joseph respecting the purchase of the farm; and that said Joseph told him that he was going away that afternoon, and could not then attend to doing anything about it, but that he should be back that night; but he, the witness, told said Joseph that he thought that he would not get back that night, as he was going the distance of eighteen miles; that after thus seeing said Joseph, he, the wit-

Slocum *agt.* Closson and Mosher.

ness, told said Isaac what his son had said to him, and he further told said Isaac, that his son Joseph told him that he would buy the farm, if they could agree, and would pay him five hundred dollars down, and the remainder the first of September following; that upon his, the witness, so informing said Isaac of what his son said, the said Isaac said that he did not want more than seventy or eighty dollars down, and the remainder on the first of September, when he calculated to go away; that his son Joseph did not get back that night, but returned the next day; that in the forenoon of the said next day, before said Joseph returned, the said Isaac called on him, the witness, several times, and inquired whether said Joseph had returned; that after said Joseph returned, in the forenoon, before dinner, the witness and said Joseph went down to the warehouse of said Joseph and found said Closson there, and said Joseph told said Closson that he would buy his place and give him his price for it, and pay him five hundred dollars down; to which said Isaac replied, that he did not want more than eighty dollars down; and thereupon said Joseph told him that he did not wish to pay him less than one hundred dollars in such a purchase as that was, or words of that import; and that said Joseph also remarked to said Isaac, that he did not wish to interfere with his, said Isaac's sister and brother-in-law, in making the purchase. To this observation, said Isaac replied, *that they should not have it*; and thereupon, said Joseph remarked to said Isaac, that either that afternoon or the next day, they would have writings drawn of their bargain; that there was nothing further said in relation to the said farm, at that time, in the hearing of the witness, and soon afterwards they separated; that afterwards, in the afternoon of the same day, the said Isaac called on the said Joseph, and told him that he wanted to have the writings drawn immediately, as a Mr. Wickes had come on from the west, and was about returning to Schaghticoke, and he, the said Isaac, wanted to go in company with him; that they, the said Isaac and Joseph, then went away together, in pursuit of some person to draw the writings, but he, the witness, did not go with them. That said Joseph

Slocum agt. Closson and Mosher.

did not give him, the witness, any authority to buy said farm for him, nor did he, the witness, ever inform said Closson that he, the said Joseph, had given him such authority ; that said Isaac did not ever tell the witness, in conversation at Syracuse, that he had agreed to sell the farm to said Mosher ; that he, the witness, did not ever tell said Closson that said Mosher did not want said farm, or anything of that import ; nor did he, the witness, ever tell said Closson that he, the said Mosher, was working against him, or calculated to get the farm for little or nothing ; that he did not tell said Closson that said Mosher had let the place get down, or out of repair, or anything of that import ; that he saw Ashley E. Fish in company with said Closson, at said Syracuse, but did not say anything to said Fish respecting his using his influence with said Closson, to induce him to sell the farm to said Joseph ; nor did he, the witness, say anything to said Fish respecting his having influence with said Isaac ; that after Closson had left Syracuse some days, witness remarked to Fish, that he supposed he, the said Fish, did not care who had the farm of the said Closson ; to which Fish replied, he did not care who had it, if Mosher did not ; that he had rather that any other person should have it than Mosher ; that he, the witness, never told Closson, or any other person, that Mosher meant to cheat Closson out of the farm if he could, or words of that import ; but that said Fish, in the course of the conversation with Closson, made remarks of that import at several different times ; that he, the witness, did not treat said Closson with spirituous liquors while they were at Syracuse, and that he had no recollection of his having ever seen him, the said Closson, drinking spirituous liquors while they were at Syracuse, but once, and then said Fish invited him, the witness, and said Isaac, to drink some spirituous liquors with him, which they did ; and that he, the said William, did not say to said Closson that he believed that said Mosher meant to cheat him out of the farm, or anything of that import ; that he, the said William B., did not see said Closson, while he was at Syracuse, intoxicated, or so under the influence of spirituous liquor, as in any manner to disqualify him to do business, although he,

Slocum *agt.* Closson and Mosher.

the witness, believes that said Isaac was in the habit of drinking more spirituous liquors than was good for him; that said Closson did not inform him, the witness, while he was at Syracuse, that said Mosher had sent out a deed of the farm to him, for him, the said Isaac, to execute; but after Closson went away from Syracuse, the said Fish so informed him, the witness. The said Isaac and said Joseph concluded the bargain for the farm, some time in the forenoon; but the writings were drawn in the afternoon. That said Fish was not present when he, the witness, first saw Closson at Syracuse.

William B. Slocum, being *cross-examined* by the counsel for the defendants, says,—that he is confident that the time at which he arrived at Syracuse was on Monday, as he is of anything whatever; that he is not positive where Closson was, when he first saw him at Syracuse, but thinks it was in the street, as he was going to his son's to breakfast; that when he first met with Closson, he, the witness, remarked to him that he was then in a hurry, but that he was not going away immediately, and that he, the witness, should like to see him after breakfast; that he then had no idea of having any business with him, but wanted to see him merely as an old neighbor, who had been gone a long time; that the next time he saw said Closson, he believes he, the said Closson, was at the warehouse, where Fish was employed.

Question. Was Mr. Fish present when you saw him, the said Closson, the second time at Syracuse?

Answer. I think he was.

Q. Did Mr. Fish then, pointing to Closson, ask you, "do you know that man?"

A. Witness says—that he does not think that said Fish worded his question in that way.

Q. How did Fish word his question?

A. Fish said, "here is one of your old neighbors."

Q. Was it at this time, or that interview, that you asked said Closson to see your son Hiram, before he sold his farm?

A. I think it was not.

Slocum *agt.* Closson and Mosher.

Q. Did you, at this interview, talk with said Closson about selling his farm ?

A. I did not.

Q. How long was you with Closson at this interview ?

A. Only a very few minutes.

Q. How long was it, after this interview, before you saw Closson again ?

A. I can't distinctly tell, but it was not a great while.

Q. Was it an hour ?

A. I cannot say whether it was an hour or half an hour.

Q. Where was Closson when you next saw him ?

A. He was on the bridge, called the stone bridge.

Q. Was Fish there with him ?

A. Fish was present part of the time only. He and Closson were there together a long time talking together.

Q. How long did this interview on the bridge last ?

A. I cannot tell ; it might have been an hour, it might have been less.

Q. Was it at this interview on the bridge that you had the first conversation with Closson, about selling his farm, mentioned in your testimony on your direct examination ?

A. It was.

Q. What time of the day was this interview ?

A. I cannot tell ; it was some time about eight, nine or ten o'clock in the morning.

Q. Did you, at that interview, request said Closson to see your son Hiram, before he sold his farm ?

A. I did so request him at that interview, or expressed a wish that he would so see him.

Q. Did Closson then promise you that he would see him before he sold the farm ?

A. He did so promise me.

Q. Did Fish, at any time during this interview, say that Mosher meant to cheat Closson out of the farm, if he could, or anything of that import ?

A. I don't remember that he, the said Fish, said anything of that import at that time.

Slocum agt. Closson and Mosher.

Q. Did you have any conversation with Closson on that day, after that interview, in relation to the sale of his farm?

A. To the best of my recollection, I did not.

Q. When did you next have a conversation with Closson, in relation to the sale of his farm?

A. On the next day afterwards.

Q. Did you see Closson, after your interview on the bridge, until the next day?

A. I believe I did not.

Q. What time the next day was it, that you saw him?

A. In the morning, after breakfast, at seven or eight o'clock.

Q. Did you, when you saw Closson in the morning mentioned in your last answer, propose to him your buying the farm for your son Hiram?

A. I can not say positively that I made that proposal to him at the first time I saw him that morning, as I saw him several times that morning, but it was at one of the times when I saw him on that morning that I made that proposal to him.

Q. How many conversations, on that day, did you have with Closson, about the sale of his farm?

A. I think I had two; at the first I proposed to him to bargain with him for my son Hiram, and at the second he proposed to me to sell the farm to my son Joseph.

Q. Where was the said first conversation?

A. I think it was in the street, not far from the Syracuse House.

Q. Was Ashley E. Fish present at that conversation?

A. I believe not.

Q. Why did you propose, at that first conversation, to buy the farm for Hiram?

A. I thought the farm was a bargain, and Hiram, I knew, wanted to buy it, and I was afraid that Closson would sell it to some other person, before he should see Hiram.

Q. Did you intend to secure the purchase of said farm, if possible, before Closson left you?

A. Yes; I would like to have done it, if I could.

Slocum *agt.* Closson and Mosher.

Q. Where was it that you had the second conversation, on that day, with Closson, relative to the sale of the farm?

A. I believe I was sitting in the store formerly kept by Mann, at said Syracuse, or one of the stores near that, I can not say which, and said Isaae came to me, and called to me.

Q. How long did this last mentioned interview last?

A. A very few minutes only.

Q. Was Ashley E. Fish present at any time during that interview?

A. No; I believe not.

Q. When did you have the next interview with Mr. Closson, in relation to the sale of his farm?

A. On the same day, in the afternoon.

Q. How long did this last mentioned interview last?

A. It lasted for a few minutes only, as witness was about to leave Syracuse to go to Salina, on that day.

Q. Was Ashley E. Fish present at that interview?

A. No; he was not present then.

Q. Where did that interview take place?

A. Not far from the packet boats lying in the canal.

Q. Did you go to Salina that afternoon?

A. Yes, I did.

Q. Did you see Closson again, until the next day?

A. No; I did not see him until the next morning, when he called on me.

Q. Did you, after the interview you mentioned near the packet boats, have any conversation with said Closson respecting his selling his farm, before you saw Closson and your son together, the next day after you saw him near the packet boats?

A. No, I did not.

A. Where did the interview between Closson and your son Joseph take place, at which they had conversation about the sale of the farm?

A. In the warehouse of said Joseph.

Q. How long did that interview last?

A. I cannot tell; I heard a few words of their conversa-

Slocum agt. Closson and Mosher.

tion, and then went out, and can't say how long they were together.

Q. Was Ashley E. Fish present at that interview, while you was there?

A. No, he was not.

Q. Was you present at any other interview whatever, when there was any conversation with Isaac Closson about his selling his farm, other than those you have stated in your testimony on your cross-examination?

A. I have no recollection that I was present at any such interviews, besides those I have already stated.

Q. What was it that made you afraid that Isaac Closson would sell his farm before he saw your son Hiram?

A. Gerrit Fort lived on the farm, and I knew that he, and several others were anxious to buy it; and I was apprehensive that he, the said Closson, if applied to, would sell it, without waiting to see said Hiram.

Q. Were you apprehensive that Closson would sell the farm, if he had an opportunity, before he saw Hiram, although he had promised you that he would not?

A. Yes, I was, from my knowledge of mankind.

Q. Are you positive that your son Joseph told Closson that he would not purchase this farm, if it was to interfere with Mosher.

A. I am positive that said Joseph so told him.

Hiram Slocum, being sworn, says,—I live in Troy, and am the brother of complainant. I know both of the defendants. I know of the complainant's calling upon the defendant, Isaac Closson, and went with him myself, I think, on the last day of August, 1833.

We went first to the boarding-house of Mr. Fullers, where he boarded, in Easton. The complainant went in and inquired for him. From there we went a circuitous rout to Stillwater, in the county of Saratoga; we found him at the village of Stillwater, in the chamber of the store of Mr. Wright; he was sequestered in that store. When we first went there, he did not come down. The complainant went to the door of the room

Slocum *agt.* Closson and Mosher.

where he was, by permission of the owner, and there told him that he had come to have a deed of land that he had purchased from him, executed, and that he had the deed there with him. Mr. Closson said that he shouldn't do anything about it. My brother at that time asked Closson why he conducted in this way? Closson replied, several times, that he didn't mean to do anything about it; that he didn't like the survey of the farm. My brother told him that he was willing to pay him for all the land there was, and that he wanted the matter arranged amicably and fairly. Closson pressed out of the room in a good deal of a hurry. My brother took his pocket-book out in the presence of Closson, but did not show him the money. When Closson pressed out of the room, my brother said to him, stop; that he didn't wish to do anything wrong about it. Closson went out on to the tow-path, and went out of sight. My brother had five thousand dollars with him.

I asked Closson myself if he hadn't had notice that they were going to survey the farm; he told me he had. The farm had been surveyed only a day or two before finding Closson at Stillwater. It was a farm that belonged to Isaac Closson and Joseph P. Mosher's wife, in the town of Schaghticoke. I carried a notice from the complainant to the boarding-house of Closson, three or four days before this, of the intention to survey the above farm.

When my brother showed Closson the pocket-book, on his coming out of the room above mentioned, the pocket-book evidently looked as if it contained money; the bills were sticking out the end of it. This room was in the second story of the store above referred to.

I meant to be understood as saying that the amount of money my brother had with him was near five thousand dollars; it was certainly over forty-five hundred dollars.

Cross-examined. At this time the complainant lived at Syracuse, Onondaga county; he had lived there at that time eight or nine years; he still continues to live there. I presume he knew that one half of this farm belonged to Joseph P. Mosher, in right of his wife. I do not know what the complainant in-

Slocum *agt.* Closson and Mosher.

tended to do with the farm. I don't know that he contemplated moving back there; I never heard him say that he did.

At the time I found Closson at Stillwater village, there were three or four of his associates with him. They were in something of a glee. I didn't discover that Closson, or any one of the company, was intoxicated so as to stagger. I know what is meant by the term high, when speaking of a person in a frolick. I can't say that Closson was incapable of answering any question put to him correctly. I have no doubt that Closson had been drinking liquor; but I can't call to my mind any one circumstance, while I was there, that would induce me to think he was excited. There was evidently something in his appearance that showed he had been drinking liquor while there.

I was at one time present at Mr. Pierson's office, at an interview between Closson, Joseph P. Mosher, and my brother. the complainant.

I saw the money that the complainant had before I saw Closson at Wright's store. I don't know as I counted it. I saw money in the pocket-book of the complainant in the morning of the day when we found Closson. I don't recollect of seeing the deed before complainant took it out in the above mentioned store of Wright. I saw a paper which complainant took out there, but didn't read the deed. I read the deed before this, and after, both. I have had the deed in my hands. This paper which complainant had at Wright's, I suppose to be the same paper.

The following depositions were taken on the part of the defendants:—

On this 8th day of September, 1834, personally appeared before me, John E. Lovett, examiner in chancery, *Ashley E. Fish*, a witness produced on the part of the defendants, who, being duly affirmed, and orally examined by the counsel for said defendants, says,—that he resides at Syracuse, in the county of Onondaga. Knows the parties complainant and defendants, and also knows William B. Slocum and Hiram Slocum: William B. Slocum is the father of Hiram and Joseph

Slocum *agt.* Closson and Mosher.

Slocum. William B. Slocum used to reside in Schaghticoke, opposite to where Joseph P. Mosher now lives; Hiram and Joseph Slocum formerly lived with their father.

I am acquainted with the farm now in dispute, called the Closson farm. Joseph P. Mosher, one of the defendants, married a sister of Isaac Closson; as nigh as I can recollect, it is twelve years since he married her; I cannot tell exactly. Isaac Closson and Mrs. Mosher were the only heirs of Robert Closson.

I think that Robert Closson died in the year 1814.

I think it was in the fall of 1827, that Isaac Closson first left here to go into the western country.

In the season of 1827, I lived with Joseph P. Mosher; and there were frequent conversations between Isaac Closson and Joseph P. Mosher, about the purchase of the said farm by Mosher, from Closson; Closson stated that he had rather that Mosher should have it than any body else, as he had married his sister and owned the other half of the farm, and it was the choice of the sister to retain said farm.

The counsel for the complainant objects to any parol testimony, as to the sale or transfer of the farm.

I heard Closson say to Mosher, that if he would give him as much for his part of the farm as any body else, that he had rather that he should have it, on account of his sister—that is, if he sold it.

I saw Isaac Closson at Syracuse, on his return from the west; it was some time in June, 1833.

I saw William B. Slocum there at the same time; Joseph Slocum lives there, and did live there at that time.

I think that William B. Slocum told me that he was there on a visit to his son Joseph; he said that he stopped at his son Joseph's house.

I heard a conversation between William B. Slocum and Isaac Closson, at Syracuse, at the time aforesaid, in which conversation William B. Slocum wanted to purchase said Isaac's part of said farm.

He said that he was authorized by Joseph Slocum, to pur-

Slocum *agt.* Closson and Mosher.

chase the interest of Isaac Closson in said farm, for Joseph and Hiram Slocum, if they could agree upon a price. Isaac Closson told Mr. Slocum that he had been gone a good while, and he did not know how the property then stood ; but, that if Joseph Mosher did not want it, that he had as leave sell to the Slocums as any body else.

Q. Do you recollect whether Isaac Closson told William B. Slocum that he, Closson, had agreed to sell his interest in said farm to Joseph P. Mosher, and that Mosher had sent a deed out to him, Closson, to be executed and sent back ?

Question objected to by complainant's counsel; answer taken, subject to the objection.

A. Yes.

Q. Did Isaac Closson show the deed to you that had been sent out to him ?

A. Isaac Closson showed me the deed that had been sent out to him. I don't recollect that William B. Slocum was by when the deed was shown to me ; William B. Slocum told Isaac Closson, that Mosher did not want the place ; that he, Mosher, had been working against him, Closson, and calculated to get the place for little or nothing.

Slocum said that Mosher had let the place go down, and get out of repair. Slocum called upon me the same day, and said to me, " You and Mr. Closson have been brought up together, and your influence will go further with him than any other person ;" and he wished me to use my influence in their behalf in purchasing the farm.

I told Mr. Closson that Hiram and the family of Slocums had always been neighbors of his, and their farms joined each other, and if they would give as much for it as any body else, I would let them have it, providing that Mosher did not want it.

Slocum said that Joseph Mosher meant to cheat Isaac out of the farm, if he could, as he believed.

I saw William B. Slocum treat Isaac Closson two or three times with brandy during his stay at Syracuse.

I should not think that Isaac Closson was in a suitable situ-

Slocum *agt.* Closson and Mosher.

ation to transact business in consequence of drinking; since he went out west, he has got to be very much addicted to drinking; he had altered so much that I hardly knew him.

Joseph Slocum was not present at any of the conversations between Isaac and me, or between his father and me. I saw Closson standing in Joseph Slocum's store door several times.

I was in the next store, and Closson was in and out frequently at Joseph's store and the store where I was. I think Joseph Slocum did not keep liquors to sell in his store; his is a forwarding store. I should think that Closson remained at Syracuse three or four days. I did not see him at any time, while there, when he was not the worse for liquor.

Q. Do you recollect whether Closson, in the conversation between him and William B. Slocum, said that Mosher had sent money out to him at the west on account of the farm?

Question objected to by complainant's counsel.

Answer taken, subject to the objection.

A. Yes.

Q. What did he say?

A. Closson observed that he had received the deed, and that money was sent in a letter directed to St. Louis. I think it was five hundred dollars.

And being *cross-examined* by the counsel for the complainant, deponent says: The first conversation I heard between William B. Slocum and Isaac Closson, at Syracuse, was when they met and were talking about the farm. I think Mr. Slocum asked him if he had disposed of his farm, and he said "no." Slocum then remarked that he should like to purchase it for Hiram and Joseph if they could agree, or words to that import. Isaac then stated that Joseph P. Mosher had sent out a deed and a letter with money in it to St. Louis, and that he then had the deed in a valise or trunk. Mr. Slocum remarked that Mr. Mosher did not wish to purchase the place; that he, Mosher, had worked against him, Closson, as he thought, while he was gone, and meant to get the place for little or nothing; he said he should like to buy the place for them, as it adjoined

Slocum agt. Closson and Mosher.

their farm ; should like to buy, if they could agree upon a price.

Mr. Closson remarked, that if Mr. Mosher did not wish to buy the farm, that he had as leave sell to them as to a stranger, or to anybody else, if they would pay as much as anybody else. I don't recollect particularly of anything more said at the first interview. I think this conversation was the second day after Closson arrived at Syracuse ; they had seen each other before this conversation ; I think they had seen each other the day before, and I think I was present when they first met. Closson was in the store where I was, and Mr. Slocum was passing by, and I spoke to him, and asked him "Do you know this young man?"

This conversation, that I have been speaking of in my cross-examination, was in the store.

Mr. Slocum arrived in Syracuse on the day that I asked him the question as above stated, as Slocum informed me. I don't recollect that I heard any conversation between them after the time above spoken of in my cross-examination.

Q. How long were Mr. Slocum and Mr. Closson together at the time of the conversation on the second day after Slocum's arrival in Syracuse, as stated in your cross-examination ?

A. I could not tell exactly,—it might have been an hour, and possibly less ; the whole conversation was not upon this subject ; they talked upon other subjects after they had first spoken upon this.

Q. Do you recollect that Mr. Slocum, early in that first conversation, remarked to Closson, that it was a good time to sell land in Schaghticoke ; that land was high, and that there was a number that wanted to purchase ?

A. I have no recollection of it ; it was the same day with the above conversation above spoken of in my cross-examination, and in the afternoon, that I spoke to Closson respecting his selling to Slocum.

Q. Did you invite Mr. Slocum and Mr. Closson to go into a grocery and drink ?

Slocum *agt.* Closson and Mosher.

A. Yes.

Q. Whose grocery was it ?

A. L. A. Cheeny's, right opposite, across the canal, from where I was.

Q. Which day was that ?

A. I presume it was the second day ; I cannot recollect.

Q. Did you ever pay for the liquor ?

A. Yes.

Q. Did you and Mr. Slocum drink anything together after that ?

A. We might have drank together, both before and after that ; I don't recollect.

Q. Did you three drink together, at any other time than the time above referred to ?

A. I don't recollect ; there was no liquor for vending in the store where I was employed ; I don't recollect that Mr. Slocum drank anything in the store where I was employed ; I did not, to my knowledge, see Mr. Slocum and Mr. Closson drink together at any other time than that above stated.

I was a clerk, and my employment was seeing to the loading and unloading boats, and delivering and receiving goods and grain ; there was a bookkeeper in the store ; I was in the house of Johnson, Howlett & Co.

Q. What were your wages per month ?

A. My wages, as allowed in the settlement from the commencement, were fifteen dollars per month ; my wages were sometimes greater than at others.

Q. Before Closson went west, did Mosher offer to sell out to him ?

A. I think there was at one time a conversation, when an offer was made by Mosher to sell out to him, or buy from him

Q. When did you leave Schaghticoke ?

A. In October, 1827, I think ; I was only once there after that ; that I think was in November, 1827, and have not been there since, until within the last two or three weeks.

Slocum *agt.* Closson and Mosher.

Q. Did you see Closson drink at any other time than with you and Mr. Slocum, at the time you have related ?

A. I don't recollect.

Q. Can't you mention the number of times that you drank with Closson ?

A. I cannot.

Q. Did you drink with him every day while he was in Syracuse, after you first saw him ?

A. I should think probably I did.

Q. Did Closson say to you, or in your hearing, that he would not sell to Mosher ; that Mosher had maltreated him ?

A. He said this, as nigh as I can recollect,—that if Mosher had tried to injure him since he had been gone, and to get his property for less than its value, that he would not let him have the place, or that he did not know what occasion he had to do it.

Q. When did he say that ?

A. I think it was during the same day, and after the same conversation above spoken of in my cross-examination ; I don't recollect that anybody else but himself and myself were present ; I don't recollect whether Mr. Slocum was then present or not.

Q. Did you hear Mr. Slocum state to Mr. Closson, that if Maria wanted the place, neither Hiram nor Joseph would wish to purchase it ?

A. I have no recollection of it.

Q. Did you tell Mr. William B. Slocum that Closson would not sell the place to Mr. Mosher ?

A. I cannot recollect ; I might have said so, or made that remark, but my impression is, that I stated to Mr. Slocum, that Isaac had told me that if that was the case, that he, Mosher, had been trying to injure him, that he would not sell him the place.

Q. Did you know when Closson left the village of Syracuse ?

A. I think it was the evening of the next day after the conversation above alluded to.

Q. When was the conversation between you and Slocum ?

Slocum *agt.* Closson and Mosher.

A. It was in the evening of the same day of the conversation between me, Slocum and Closson, or the day following that.

Q. When was it that Slocum asked you to use your influence with Closson to get him to sell to his sons?

A. I think it was the same day with the main conversation.

Q. What was your reply to his request?

A. I remarked that it was none of my business; that if Hiram wanted the place, and Mr. Mosher did not, that I had rather, if I was in Isaac's place, sell to him than to a stranger. I told him that I would see Isaac, and talk with him about it. I told him that Mr. Mosher had always been a good friend of mine, and that I did not want to meddle with the business.

Q. Was this after you had seen the deed?

A. Yes.

Q. Had you seen the deed before the conversation between Slocum and Closson about the farm?

A. Yes.

Q. Did Closson complain to you that Mosher had not sent on money of his that he held in his hands, and find fault with him in consequence of it?

A. I have no recollection of it.

And on the second *direct examination* by the counsel for the defendants, deponent says,—I recollect well of drinking with Mr. Slocum and with Closson separately, and also together, all three of us at the time mentioned, in the grocery; I recollect no other time that we three drank together.

Q. At what time did you see Slocum and Closson drinking together?

A. I should think at twelve o'clock at noon, at Cheeny's, the same grocery where we three had drank together in the forenoon. I had been to the collector's office, and was keeping Cheeny's; Isaac called me in and asked me to drink; I told him that I did not care about it, and walked along and left them there.

Slocum *agt.* Closson and Mosher.

And on the second *cross-examination*, the complainant's counsel asked the following question :

Was it Isaac that was treating at that time, or was it Slocum that was treating ?

A. That I cannot say ; I only halted a minute, and went on.

Monroe County, ss.—On the twenty-first day of July, 1835, before me, Isaac Hills, examiner in chancery, appeared the parties in this cause, by their respective counsel, and proceeded to take testimony in the same, when

George C. Allen was called as a witness on the part of the defendants, who, being sworn, says,—That he resides in the city of Rochester, in the county of Monroe, and is sixteen years of age ; he says he knows the complainant, and Mr. Closson he has seen occasionally, and Mosher he knows when he sees him ; he lived with Mr. Slocum in June, 1833, and lived with him at the time when a contract was made between the complainant and Isaac Closson, relative to a farm in Schaghticoke ; he believes Mr. William Slocum (said to be the father of Mr. Joseph Slocum,) was present at the time of the making of the contract, and went away after it was done ; witness was not present when the bargain was closed ; was present and heard the parties talking about the sale before the contract was made, and heard them say afterwards that they had contracted ; Closson went away the day the bargain was made ; after it was made, he was back again in a day or two ; he heard something said similar to this, that the land was bought for William Slocum, don't recollect who it was that said it ; he heard it said when in the warehouse ; there was a number there ; Nichols was a clerk there ; he can't name the others who were present ; heard it said that the farm was worth considerable more than was to be paid for it, but don't know who said it ; can't say whether he did or not hear Joseph Slocum say that it was worth more than the contract price.

On *cross-examination* by complainant's counsel, the witness says he is not certain, but he don't think Joseph Slocum was present at the conversation which took place in the warehouse ;

he believes Mr. Closson first proposed the contract to Joseph Slocum ; did not hear Slocum tell Closson he had better keep the land ; should think Closson was sober ; the proposals relative to the purchase and sale of the land were in the morning ; he recollects that Joseph Slocum left town that day, but whether before the writings were executed or not, he does not know.

On a further *direct examination*, the witness says he don't know how long Mr. Slocum was gone, but should think he was gone over night, or returned during the night ; don't recollect that he heard anything said between Mr. Slocum and Mr. Closson on the subject of the land, after Mr. Slocum's return ; Closson was there two or three times ; when he first came there, he should think he was sober, but at some of the other times he had the appearance of being in liquor ; witness says he heard no conversation about the land, except the first time that Closson came there, and at that time he appeared to be sober.

George W. Fish, being sworn, says,—That he resides in the city of New-York, and formerly resided in the town of Schaghticoke, in the county of Rensselaer, is thirty years of age, and is acquainted with the parties complainant and defendants in this suit. That some time in the month of June, in the year 1833, he saw the defendant, Isaac Closson, at the town of Schaghticoke ; soon after he returned from the west, and at the request of said Isaac Closson, he went to see the complainant, Joseph Slocum, to Syracuse, in company with said Closson. That his object in going to see said Slocum was, to see if said Slocum would not relinquish his contract with said Closson, for the sale of his farm in Schaghticoke ; this was in the latter part of said June, in the year 1833. That he then saw the complainant at Syracuse ; that said Closson told the complainant that he found, on his arrival at Schaghticoke, that Joseph P. Mosher wanted the farm, which, at the time he made the bargain with Slocum, he had been given to understand that said Mosher did not want the farm, which was the reason of his making the contract with Slocum for the farm ; said Closson told Slocum that he rather wished said Mosher should have

Slocum *agt.* Closson and Mosher.

the farm; that it was his intention to have let him have it, if he, Mosher, wished it; that he did not tell Slocum that he had previously offered the farm to Mosher, or that there was any contract with Mosher respecting it; that he does not recollect that he, Closson, then told the complainant by whom he had been given to understand that Mosher wanted the farm; that said Slocum appointed several times for them to meet him, that they might talk the business over, and have it understood, that there should be no trouble about it; they were at Syracuse two days or more; that they repeatedly called at the times appointed, and sometimes they found Slocum, and sometimes he was absent; when present, he would appoint another time to see them; and when they saw him, he always told them that there should be no difficulty about the business; and told them he should be at Schaghticoke in a few days, and he would see Mr. Mosher and Mr. Closson together, and they would have the matter settled without difficulty; that Closson told the complainant that he was willing to pay him back the \$100, which Slocum had paid him, and pay him for his trouble, if Slocum would give up the contract for the farm; that Slocum said, that it would make no difference as to his paying him then; that he should be down in a few days, and then the business would be settled; that the complainant said that he bought the farm for his father, William B. Slocum.

Gerrit Fort, a witness already examined on the part of the complainant, being again called and examined on the part of the defendants, says,—That he was present at a conversation between Hiram Slocum and Joseph P. Mosher, at the house of said Hiram, in Schaghticoke, in the month of August, in the year 1833. Said Mosher asked said Hiram, why he had not written to Joseph Slocum, as he had agreed to do; that said Hiram replied, that it was on account of his having since seen his father, William B. Slocum, and what he had told him.

Gerrit Fort, being *cross-examined* by the counsel for the complainant, says,—That said Hiram Slocum, in his conversation with Joseph P. Mosher, stated on his direct examination, further added, that his brother had received a very unkind let-

Slocum *agt.* Closson and Mosher.

ter from said Mosher; that he, the witness, does not know that there was anything said in that conversation as to the time when said Hiram was to have written to his brother, Joseph Slocum.

Gerrit Fort, being further examined on the part of the defendants, says,—that he don't know that it was stated in that conversation when Joseph Slocum received the letter from said Mosher, mentioned in his testimony on his cross-examination.

Daniel Southwick, a witness produced, sworn, and examined, in a certain cause, pending and at issue in the court of chancery of the state of New-York, before the chancellor, in which Joseph Slocum is complainant, and Isaac Closson and Joseph P. Mosher are defendants, on the part of the defendants, testifies and deposes as follows, to wit :—

Daniel Southwick, being sworn, says,—That he resides in the city of Troy, and is by profession a merchant, and is acquainted with Isaac Closson and Joseph P. Mosher, the defendants in the above suit, but is not acquainted with the complainant. That on the 23d day of April, in the year 1833, the defendant, Joseph P. Mosher, called on him, and told him that he wanted to forward \$200 to Isaac Closson, at St. Louis, Missouri; that he, the witness, did, on that day, enclose \$200 for him in a letter directed to Isaac Closson at St. Louis; which letter, enclosing the said money, he, the witness, put into the office in Troy. The counsel for the complainant objects to testimony of any conversation between witness and Mosher when complainant was not present, and the testimony is taken subject to that objection.

Job Pierson, Esq., counsellor at law, being sworn, says,—that in the month of April, in the year 1833, he put the blank deed, now presented to him at the time of his examination, marked Exhibit H, enclosed in a letter, directed to Isaac Closson, then at St. Louis, in Missouri, into the post-office in the town of Schaghticoke, or Troy, with a request for him to execute the same, and return it to him, the witness, or to Dr. Joseph P. Mosher, by mail; and the witness further says, that

Slocum *agt.* Closson and Mosher.

he is acquainted with the hand-writing of Isaac Closson, and has seen him write, and that the name, Isaac Closson, subscribed to the paper writing now produced, and shown to him at the time of his examination, marked Exhibit No. 1, he believes is the proper hand-writing of the said Isaac Closson; and that the residue of the contents of said paper writing not subscribed with his name, is in the hand-writing of the said Isaac Closson; and that the signature of the paper writing, now also shown to him, at the time of his examination, marked Exhibit No. 2, and the contents of the same paper writing, marked Exhibit No. 2, he believes is in the proper hand-writing of the said Isaac; and also, that the paper writing now shown to him, at the time of his examination, marked Exhibit No. 3, and the name Isaac Closson signed to the same, and the contents thereof, he believes are in the hand-writing of the said Isaac Closson; and also, that the name Isaac Closson, subscribed to the paper writing, marked Exhibit No. 4, now produced and shown to him, at the time of his examination, he believes is in the hand-writing of the said Isaac Closson; and also, that the name Isaac Closson, subscribed to the paper writing now produced, and shown to him at the time of his examination, marked Exhibit No. 5, he believes is in the proper hand-writing of the said Isaac Closson; and also, that the name Isaac Closson subscribed to the paper writing now produced, and shown to him at the time of his examination, marked Exhibit No. 6, he believes is in the proper hand-writing of the said Isaac Closson.

Charles R. Mosher, being sworn, says,—that he resides in the town of Easton, in the county of Washington. Is a physician and surgeon; is acquainted with the parties complainant and defendants in this suit; that he is a deputy post-master in said Easton, and has been such post-master about eight years; and is a brother of Joseph P. Mosher, one of the defendants in this suit; that some time in the year 1831 or '32, the said Joseph P. Mosher, in his presence, enclosed the sum of \$200 to Isaac Closson, at St. Louis, in the state of Missouri, which letter, enclosing said sum, he, the witness, as deputy post-master,

Slocum *agt.* Closson and Mosher.

forwarded by the mail to him, the said Isaac Closson, at St. Louis.

Question. Did your brother, at the time of enclosing said money, inform you for what purpose it was sent?

To this question the counsel objects, and the answer is taken subject to that objection; and witness says,—that it is his impression, that he stated that the money was sent to Closson on account of the purchase of his interest in the farm in question in this suit; but that he can't be positive that the said Joseph P. Mosher told him for what purpose the money was sent; that he has known his brother to enclose money to said Closson, and he thinks at several different times; but the number of times, and the particular time of such enclosures, he does not recollect; and that it is his impression that, at the time of those enclosures, the said Joseph P. Mosher informed him that the money was sent to Closson on account of the purchase of his interest in said farm.

Charles R. Mosher, being *cross-examined* by the counsel for the complainant, says—that he does not recollect that his brother forwarded any money to said Isaac Closson, after he forwarded the \$200 mentioned in his testimony on his direct examination, and cannot say at what time the other moneys forwarded by his brother, Joseph P., were forwarded to Isaac, whether before or after the \$200, and that he cannot say that he recollects that any money was forwarded to him by his brother, after the forwarding of said \$200.

EXHIBIT H.

Contains a warranty deed, between Isaac Closson of St. Louis, in the state of Missouri, of the first part, and Joseph P. Mosher, of the town of Easton, in the county of Washington, and state of New-York, of the second part—date blank—consideration \$3000—containing general boundaries of said farm in question—supposed to contain 210 acres—not executed

Slocum *agt.* Closson and Mosher.

EXHIBIT No. 1.

St. Louis, Dec. 25, 1828.

An opportunity presents itself again for me to write home. I have wrote twice, and received no answer ; but I am in hopes this trial to have some news. Except a severe turn of the bilious fever last August, I have been extremely hearty. I have been travelling about this world almost continually, waiting an opportunity of going to the mountains, but as yet have had none ; but I shall start the 1st of next April. I shall be likely to stay some two or three years. I have hired myself to Mr. Loublet at \$400 a year. As Ashley has made money enough, he has stopped that business. I arrived at St. Louis the first day of April ; after remaining at that place two or three days, I got on a boat bound for the Council Bluffs, one thousand miles up the Missouri river ; returned in about a month and a half. I then started in a boat for Fever river, five hundred miles up the Mississippi, to the extensive back mines ; after staying there about a week, I started in a boat for St. Peters, at the Falls of St. Anthony. I returned from that place to this about the middle of August ; I was taken sick, and confined about three weeks, at no small expense ; after recovering my health, I went up the Illinois lumbering. I was so unfortunate as to lose the two first rafts, on the snags and sand bars. I have since been lucky. As ice now begins to run so thick that there is no more business to be done at present, I shall take up winter quarters about twenty miles up the Illinois, and run my lumber down early in the spring. Write to me about everything, as you know I am not fond of writing.

Yours, &c.,

ISAAC CLOSSON.

JOSEPH P. MOSHER.

In particular, I want you to send me \$100 in United States paper, in one bill if you can. I want to purchase a lot of land on the Illinois, which I conceive to be valuable, and shall not

Slocum *agt.* Closson and Mosher.

be able without assistance ; direct the same to St. Louis ; by doing this you will oblige your friend. I can get returns from St. Louis every week ; probably the reason of the letters that I wrote never reached, on account of my sending them on steamboats to be put in office at Pittsburgh. I have no more at present.

I. C.

EXHIBIT No. 2.

January 30, 1830.

*Dear Brother-in-law :—*I enjoy the present opportunity of informing you that I am still alive and in good health, hoping you all the same luck. I have been from St. Louis about one year. I started up the Illinois, not calculating to stay long, but a drove of cattle starting from Naples, I started with them for Green Bay ; from there I got on board of a keel boat bound for Prairie du Chein, six miles above the mouth of the Ouisconsin river ; from there I got on another boat, bound for St. Peters, at the Falls of St. Anthony ; I returned to the mines at Fever river, staid there the summer, fall and part of the winter ; from there to St. Louis, where I am at present. Concerning the letters that you sent on for me ; when I went up the river, I told James Woods to take the letter out of the office and secure it for me ; while I was gone up the river, he received the two letters ; not hearing from me for some time, made use of the money, calculating to return it when he would again see me ; but he is now at New-Orleans. I hear that you have removed to Union Springs, at Cayuga Lake. Mr. Sterrett and myself have purchased a lot at the Upper Rapids, on the Mississippi, for the purpose of keeping groceries and provisions, and shall be under the necessity of again calling on you for assistance ; I shall want at least two hundred dollars ; be quick as possible, if you please. Write to me about the affairs at large. I shall remain your friend.

(Signed,)

ISAAC CLOSSON.

Slocum *agt.* Closson and Mosher.

EXHIBIT No. 3.

St. Louis, February 18th, 1831.

Dear Brother-in-law:—It must seem strange to you that I have not answered your letters before this, but it has not been through neglect on my part. The reason is, after I requested you to send me \$200, I had some business with Mr. Jackson, who was running a boat up to the mines and to Prairie du Chein, up the Mississippi, and went up with him; I directed Mr. Steritt, in St. Louis, to take out your letter and keep it until I returned; after I got to Prairie du Chein, I was taken with the ague, which lasted about three weeks before it could be stopped; I then returned to Galena; I there was taken with the fever and some chills, and had to stay there for two months before I could start down; and after starting, I did not get down further than the Rapids, and lay there for some time; after gaining strength to go, I started on a keel boat, there being no steamboat running, the river was so low. By exposing myself in the winter, I was taken worse, but still kept on the boat until I got to St. Louis; when I got there, I found that Mr. Steritt had gone to the mountains; I went to the post-office and inquired for letters for myself; they told me there were letters for a person of that name, but was forbid letting them go unless positive proof of my name. This was in October; I was yet unwell. Some of my particular friends were living about six miles from St. Louis; I got in a boat and went up; my sickness kept on. About the first of November, Mr. Steritt came down from the mountains, took out the letters and fetched up to me; I grew worse from that time until Doctor Campbell gave me up for gone; other doctors from St. Louis was employed, but thought there was no chance for my recovery; they could not tell my complaint, and did nothing but pour calomel into me, until they had got about 260 grains into me at one time without operation. About this time, the fever fell into my head and set me crazy; I remained so for some time; after I began to recover, I was recommended to

Slocum *agt.* Closson and Mosher.

go into the woods, where I would be out of the noise. I started up the river, and encamped about the Illinois river; was there taken sick again, suffered much; when I began to recover, I gained fast, and am at this present time well; I could not send to an office on account of snow, which is deep; I waited for a break of the winter to come down; being anxious to write, I broke my road through the snow. You reminded me of your power of attorney was out, but sickness prevented me from renewing it; you told me that you would buy the farm; I want to sell, for I am broke; my sickness expenses have cost me everything and more; I must have suffered if you had not have sent me the \$200 that I requested; I want you to send me \$200 more, if it be in your power, and tell me what you will give for my part of the farm, and how you will make payments. I have pitched upon a place about the rapids of the Illinois, to spend the remainder of my days; I am tired of travelling. I still remain your friend.

(Signed,)

ISAAC CLOSSON.

EXHIBIT No. 4.

St. Louis, March 15, 1831.

Dear Brother-in-law:—I have lately dropped a line to you concerning my delay in not writing; I told you the reason of my not writing before; I told you the desperate spell of sickness that I had, which was the reason not answering your letters. I informed you I received your letters, and \$200 that I requested. I went up the Illinois river in the woods, as was recommended by the physicians of St. Louis, having no chance of getting a letter to the office, no roads broke, snow was deep; I broke my road through the snow for the purpose of writing; I wrote a letter dated the 18th February, 1831; went up again, and have again returned to St. Louis; I again write this short note for fear; you told me that you want my part of the farm; I told you to write how and when; I want to sell;

Slocum *agt.* Closson and Mosher.

likewise, I requested you to send me \$200, which I stand in need of; I have my health at present; accommodate me if you can. I give my love to my sister and all.

Your sincere friend, (Signed,)

ISAAC CLOSSON.

EXHIBIT No. 6.

St. Louis, March, 25, 1833.

Dear Brother-in-law:—I received a letter from you, dated March 4th, 1833, stating that you are aware that some persons inquiring of Franor are imposters. I received your letters, enclosed with \$200; I answered as a receipt; it appeared that you have not received the letter. I have not wrote since, concerning the farm. I want you, if you can afford, to give me \$30 per acre; you can take the place; I want you to let me know immediately. If you don't want the place, I will come or send a power of attorney, if you will accommodate me as soon as possible with returns. The little other affairs, if you fix, it will be an accommodation, in full confidence that you will do me justice. If I have a sister living, give her my respects. For instance, we bound our farm on the north by Isaac Fish's; east Williams, Richard Bryan, Sam. Wilber, Thomas Slocum, Bucklin Coon, items which I think will satisfy you that I am Isaac Closson. If it will be your pleasure, as I have started some little business, if you could accommodate me with some \$2—300, it would

Your friend, (Signed,)

ISAAC CLOSSON.

To J. P. MOSHER.

EXHIBIT No. 5.

St. Louis, November 18, 1832.

Dear Sir:—I received intelligence of a letter directed to the P. M. of St. Louis, stating that a letter was directed to the care of J. Steritt; I was at the post-office at the time the let-

Slocum *agt.* Closson and Mosher.

ter should be there ; I inquired for the same ; the P. M. told me there was no letter for him or me ; I called again, and from his conversation was satisfied there was ; I put a letter immediately into the post-office, directed to Joseph P. Mosher, Union Springs, &c. I waited the usual time, received no answer ; I then thought to stop ; after receiving intelligence of this letter, dated the 24th of May, received the 7th of June, and sent to me the 15th of November, I thought to write again ; I received no information of you or my sister, the letter being from Charles R. Mosher ; I at present enjoy good health ; I want to come home this fall, if possible, but, without assistance, impossible. If you could assist me with \$200, you would oblige your friend.

ISAAC CLOSSON.

TO JOSEPH P. MOSHER.

The depositions of the witnesses for the respective parties having been taken, an order was entered with the register of the court of chancery, on the 23d day of November, 1837, closing the proofs ; and on the 18th day of December following, an order was entered, referring the cause to the vice-chancellor of the fourth circuit for a hearing.

On the 26th day of July, 1838, a hearing was had before Hon. JOHN D. WILLARD, vice-chancellor of the fourth circuit ; who afterwards, on the 18th day of August following, delivered the following opinion :—

If Joseph P. Mosher purchased the premises of Isaac Closson subsequent to the contract entered into between the complainant and the said Isaac, and with notice of said contract, and not in pursuance of an agreement made between him and the said Isaac of an earlier period, he is a proper party to this bill ; and all other things being established, his deed is liable to be set aside in order that a specific performance may be decreed of the agreement between complainant and Closson. (*See 5 J. Ch. R. 231.*)

That every individual should fulfill his contract, so long as the power to do so remains with him, must be admitted to be

Slocum *agt.* Closson and Mosher.

a moral obligation. According to the established forms of the common law, there was no remedy afforded in case of a breach of contract, except in the nature of pecuniary damage for the wrong sustained. This mode of redress was at an early period of the law found to be defective, and in many cases wholly inadequate; hence the court of chancery, possessing more complete control over parties, and moulding its decrees to the particular circumstances before it, acquired, at an early day, jurisdiction of this class of cases, and afforded relief in cases where the common law failed.

But to induce this court to interfere, two things must be made out on the part of the complainant. 1st. That the legal remedy is inadequate, and that without a specific performance injustice would be done, or irreparable injury produced: And, 2d. That the contract is fair, just, and reasonable, equal in all its parts, founded on an adequate consideration, and free from fraud, misrepresentation, or surprise. As the remedy for a breach of a contract is, under ordinary circumstances, confessedly at law, the party who seeks to invoke the aid of a court of equity, holds the affirmative, and must make out a case entitling him to the relief sought. It is not enough, to entitle him to a decree, to prove, as in a court of law, the execution of the instrument. The form of the bill, as well as the ordinary course of the court in this class of cases, imposes on the complainant a greater burden.

It will not be necessary, to a correct decision of this cause, to review all the cases which have been cited. The general principles, applicable to the present remedy, are correctly stated in the last edition of *Fonb. Eq.* 45 to 48, and notes, and 281, *et seq.* 2 *Story Equity, title Specific Performance.* The doctrine, too, was correctly stated by chancellor KENT, in *Seymour v. Delancy*, (6 *J. Ch. R.* 222,) and by chief justice SAVAGE, on delivering his opinion in the same case in the court of errors, (3 *Cowen*, 445.) Although the decree of chancellor KENT was reversed by the court of errors, and although chief justice SAVAGE was in the minority in that court, it is obvious that the reversal was occasioned by a difference of opinion as

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to the facts proved in the case. SUYDAM, senator, delivered the prevailing opinion, and it will be seen, by an examination of it in 3 *Cowen*, page 530 and 531, that, in his judgment, the facts did not sustain the opinion of the chancellor and chief justice. There is nothing else in his opinion that can in the least shake the legal positions of those distinguished jurists. They are as much entitled to our respect, as authority, as if the decree had been affirmed.

The case of *Seymour v. Delancy* turned mainly on the question whether there was such inadequacy of consideration, as to induce a court of equity to refuse to carry it into effect. The chancellor and chief justice were of that opinion. It was agreed on all hands that there is a distinction between the exercise of the power of the court in setting aside agreements for fraud, inadequacy, and the like, and in decreeing their specific execution. It was conceded that the court might lawfully *refuse* to compel a specific performance of an agreement which it could not *set aside*, and against which it could not *relieve*, if it was once executed by the parties.

The reason for this diversity may in part be found in the fact, that an application for a specific performance of an agreement is addressed to the sound discretion of the court, and is not to be exercised when the plaintiff has so conducted as to forfeit his claim to its interposition. These are well established principles.

It is important, then, to consider whether the plaintiff's conduct in the present case commends his cause to the favorable notice of the court.

It is alleged that William B. Slocum, who acted as the plaintiff's agent in procuring the contract in question, assisted in getting the defendant, Closson, intoxicated, and that he made false statements to him, having a material influence on his mind, and which probably induced the contract.

It is evident that Closson was addicted to the excessive use of ardent spirits; that this was known to plaintiff and William B. Slocum; that Closson had before this made up his mind to sell the premises to his brother-in-law, the other defendant;

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that a part of the consideration was advanced by the latter to Closson, and that these facts were known to William B. Slocum at the time he made the bargain. It is probable, also, that Slocum induced Closson to believe that his brother-in-law, Mosher, did not want the place; that he had treated him unfairly, by letting it go to ruin with a view to get it for nothing; that Mosher wanted to cheat Closson out of the place; and that he then excited a hostile spirit in the bosom of Closson towards his brother-in-law. These facts are all proved by one witness positively; and some positions of the most material parts of this testimony, are strongly corroborated by other witnesses. I shall therefore assume that the facts are true. On the score of credibility, Fish is to be preferred to Wm. B. Slocum.

It remains to consider what effect these facts ought to have on the agreement in question. That the representations made by Wm. B. Slocum, as to Mosher, were entirely false; and that they were the means by which he induced Closson to change his mind and to sell the place to the plaintiff, after it had been made up to convey to Mosher, I have no doubt. In *Livingston v. The Peru Iron Company*, (2 Paige, 390,) the chancellor decided that a purchase would be set aside, obtained by a representation that the land was good for nothing but a sheep pasture, when the purchaser knew it contained a valuable iron mine. In the discussions of that case, the chancellor was led to remark on the difference between an application to set aside a conveyance already made on the ground of fraud, and a bill to enforce specifically an agreement obtained by the same fraud. And he observes that he was not aware of any case in this country, in which an agreement was *set aside* on a mere suppression by the buyer of a fact materially enhancing the value of the property; but he observes, the court will not enforce the specific performance of the contract, if the complainant has intentionally concealed a material fact from the adverse party, the disclosure of which would have prevented the making of the agreement. The assertion of a falsehood is equivalent to the concealment of a fact. If the falsehood asserted be of a matter sufficiently important to induce the making of a contract, it is enough to

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prevent the aid of this court to enforce it. The parties must be left to their remedies at law ;—this court will not countenance falsehood or fraud, nor aid a liar in his wicked design.

Nor should it be forgotten, that Closson was a man of intemperate habits. Although the defendants have failed to show that he was intoxicated when the contract was made, it is nevertheless evident that a man of such habits would be more accessible to impositions, and his temper more easily excited, than a man of sobriety. The assertions made by Wm. B. Slocum, as to the conduct of Mosher, were calculated to have a controlling influence on the mind of Closson. In short, they induced him to make the contract. Those assertions were false. No attempt has been made to prove that they were true.

If it be said that the morality of trade will justify a departure from truth, and that each party deals with the other at arms' length, it may be answered that such considerations are applicable only to proceedings in a court of law, which disregards any unfairness, inadequacy of price, or misrepresentation, unless of so gross a character as to amount to actual fraud. A court of equity holds to a pure system of ethics. It withholds its aid from the party who seeks to enforce an unfair or unconscionable bargain ; and lends it only to prevent the other party from practicing a fraud. The party who calls for its co-operation, must show himself entitled to it by the honesty and integrity of his conduct. If the contract has been obtained by misrepresentations, a court of equity leaves the parties to their legal remedies.

With regard to the defendant, Mosher, the bill should doubtless be dismissed with costs.

In making the purchase of the farm in question, he merely consummated a bargain which he had commenced negotiating before the plaintiff made any proposition to buy. It is unnecessary to affirm that the bargain between him and Closson had been so far completed when the contract between Closson and plaintiff was entered into, as to entitle him to the aid of this court to enforce its specific execution. The bargain between

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Mosher and Closson was broken off by the misrepresentation of the plaintiff or his agent. It was natural that Closson, when he found he had been imposed upon by the plaintiff, should refuse to carry the contract into effect, and should fulfill his original design. The plaintiff foresaw that such would be the case, and hence the anxiety of Wm. B. Slocum to have the contract reduced to writing before Closson could see Mosher. The complainant, in fact, has no equity against either defendant, and the bill must be dismissed as to both, with costs.

A decree was, on the 18th Sept., 1838, accordingly entered, dismissing the bill, with costs as to both defendants.

From the whole of this decree the complainant appealed to the chancellor, which appeal was brought to a hearing on the 26th day of August, 1840, and the chancellor afterwards, and on the seventh day of March, 1843, delivered the following opinion:—

The CHANCELLOR.—This is an appeal from a decree of the vice-chancellor of the fourth circuit, dismissing the complainant's bill.—It is unnecessary to go into a critical examination of the facts in this case, as I concur with the vice-chancellor in his conclusion, that the contract, of which a specific performance is sought, was unfairly obtained; and that a court of equity ought not to enforce its performance as against either of the defendants. But if the complainant has any claims whatever against the defendant Closson, he should be left to his remedy at law. The decision of the vice-chancellor was, therefore, right in this case; and the decree appealed from must be affirmed with costs.

From the decree of the chancellor, affirming the decree of the vice-chancellor, the complainant, Slocum, appealed to the court of errors. The proceedings subsequently were transferred to this court.

*David L. Seymour, attorney and counsel, and
Joshua A. Spencer, counsel for appellant.*

First. There is no proof of a prior valid contract between

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Isaac Closson and Joseph P. Mosher, to sell the property in question. It amounted to a negotiation—a proposal for a sale merely. (*See Exhibits No. 3, pp. 57, 58; do. No. 4, p. 59; do. No. 5, pp. 59, 60; Testimony of William M. Dennis, pp. 22, 23; Carr v. Duvall, 14 Peters, 77.*)

Second. Although decreeing the specific performance of a contract is a matter resting in the discretion of a court of equity, yet that discretion is subject to certain established rules, and among them the following:—That a specific performance will always be decreed when the contract is in writing, is certain; is fair in all its parts; is for an adequate consideration; and is capable of being performed. (*2 Story's Eq. Juris. p. 60, § 751; Fonb. Eq. 46, note 2, and cases there cited; Seymour v. Delancy, 3 Cow. 525.*)

This contract has all the above requisites. (*See contract as stated in the bill, pp. 4, 5; and testimony of Wm. B. Slocum, pp. 29 to 37, inclusive; testimony of Gerrit Fort, p. 24; and John Wilkinson, pp. 19, 20.*)

Third. Joseph P. Mosher having purchased of Isaac Closson, with knowledge of the previous contract between the complainant and said Isaac, is affected by that knowledge. His deed should be set aside, or he compelled to join with said Isaac in the specific performance of said contract between the complainant and Closson. (*2 Story's Eq. Juris. 103, § 748; Taylor v. Stibbert, 2 Vesey, Jr., 438.*)

☞ *J. A. Spencer* in reply—examines the evidence, &c. ☞

*Caggar & Stevens, attorneys, and
Samuel Stevens, counsel, for respondents.*

First. The remedy by specific performance, is not a right to which the party is entitled *ex debito justitiae*. It is an appeal to the extraordinary jurisdiction of the court, and therefore rests entirely in its discretion, upon a view of all the circumstances in each particular case. (*2 Story's Eq., § 742; St. John v. Benedict, 6 J. C. R. 117; Seymour v. Delancy, id. 224–228; S. C. in error, 3 Cow. 445.*)

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Second. If the contract have been obtained by fraud, deceit, or misrepresentation, not amounting to fraud, or by surprise, or any other unfair or inequitable practice, a specific performance will not be decreed, but the complainant will be left to such remedy as he can obtain at law. (2 *Story's Eq.* §§ 750, 751-769; 6 *J. C. R.* 225-6; 3 *Cowen*, 505-518, 521-526; 1 *Madd. Ch. Prac.* 321, *Am. ed.*, 1817; *do.* 404-5, *ed.* 1827.)

Third. The agreement in question was obtained with a knowledge and in violation of a previous parol agreement or understanding between Closson and Mosher, that Mosher was to have the farm, he having advanced to Closson a considerable portion of the purchase money, and had transmitted a deed to Closson to be executed by him for his part of the farm; and this was effected by playing upon a mind enfeebled and rendered irritable by gross habits of intoxication, by falsely alleging that Mosher did not want the farm, and that he was permitting it to get into a dilapidated state, so that he could obtain it for a trifling consideration. (*Pp.* 40-43; *corroborated pp.* 48-9.)

Fourth. The contract was agreed to be abandoned by the agent of the complainant, and all objections to the conveyance of the farm by Closson to Mosher were abandoned in July, 1833, a short time before the conveyance to Mosher. (*P.* 26.)

A parol discharge of a contract is a good defence to a bill for specific performance. (2 *Story's Eq.* § 770.)

Fifth. Mosher had the prior equitable right to the conveyance, and that right having been consummated by his subsequent acquisition of the legal title, he is, in justice and equity, as well as in law, entitled to retain it.

Sixth. For these reasons, the decree of the vice-chancellor and chancellor should be affirmed.

DECISION—*Decree affirmed.* For *affirmance*—JEWETT, Ch. J.; GARDINER, JONES, WRIGHT and GRAY, JJ. For *reversal*—BRONSON, RUGGLES, and JOHNSON, JJ.

NOTE.—The opinion of the vice-chancellor, WILLARD, is the only one which discusses the merits of this case. And he *held*, that the party who seeks the

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aid of a court of equity, in enforcing a specific performance of a contract, holds the affirmative, and must make out a case entitling him to the relief sought. And must show, 1st. That the legal remedy is inadequate; and that, without a specific performance, injustice will be done, or irreparable injury produced. And, 2d. That the contract is fair, just, and reasonable, equal in all its parts, founded on an adequate consideration, and free from fraud, misrepresentation, or surprise.

Held, that in this case, the proof showed—allowing, on the score of credibility, Fish to be preferred to Wm. B. Slocum—that it was probable that Wm. B. Slocum induced Closson to believe that Mosher did not want the place; that he had treated him unfairly, by letting it go to ruin with a view to get it for nothing; that Mosher wanted to cheat Closson out of the place; and that he then excited a hostile spirit in the bosom of Closson towards Mosher. That these assertions had a controlling influence on the mind of Closson, and induced him to make the contract with plaintiff. That they were alleged to be false, and no attempt had been made to show that they were true.

The complainant, in fact, had no equity against either defendant.

Not reported.

VILAS & BACON, appellants, *agt.* JONES & PIERCY, respondents.

Questions discussed.

1. Where complainants—sureties upon a promissory note—in an action at law against them, the payor having set up the defence of *usury*, which complainants were unable to prove on the trial, by reason of their principal witness, the payee of the note, who was not plaintiff on record, swearing that he was *plaintiff in interest*, (complainants not having verified their notice under the usury act of 1837,) and excluded as a witness in chief on that ground, and thereupon judgment passed against the complainants,

Whether they could, after such a judgment, be relieved in equity, by alleging in their bill, and setting forth as the ground of their complaint, the usury and these facts?

2. Whether the usurious agreements, executed and executory, for the extension of the time of payment of the note given by the payee to the payor, the principal debtor, without the consent of the complainants, as sureties, discharged them, and entitled them to the relief sought by the bill?

3. Whether *sureties* on a note are to be deemed "*borrowers*" within the equity of the act of 1837, as far as it regards the remedy given by that act?

THE bill in this cause was filed by Royal Vilas and William Bacon against Timothy Jones and William Piercy: and al-

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leged, that on or about the 23d of April, 1839, at Ogdensburgh, in the county of St. Lawrence, it was corruptly, and contrary to the form of the statute, agreed by and between Timothy Jones, of the town of Lisbon, in said county, farmer, and Harvey Church, of Ogdensburgh, aforesaid ; that said Jones should lend, and advance to said Church the sum of \$200 ; and that said Jones should forbear and give day of payment thereof to said Church, from the day of lending and advancing the said money, for the space of six months, then next ensuing, for certain usurious interest, to be to him, in that behalf, paid by the said Harvey Church, at the rate of ten per cent. per annum ; and it was further, corruptly and contrary to the statute, agreed between said Jones and said Church, that, for the purpose of securing the repayment to said Jones of the said sum of \$200 so to be loaned, together with the usurious interest thereon, at the rate aforesaid, the said Church should make his certain promissory note, in writing, payable six months after date, for the said sum of money so to be loaned, together with the said sum of ten dollars, making the whole sum \$210 ; and should procure said Vilas & Bacon to sign the said note as sureties with said Church, and should deliver said note, so signed, to said Jones, for said sum of \$200.

The bill stated that, in pursuance of such agreement, said Jones did lend and advance to said Church said sum of \$200, and, for securing the payment thereof, said Church, together with said Vilas and Jones, as his sureties, executed and delivered to said Jones their joint and several promissory note, bearing date April 23, 1839, payable to said Jones or order, in six months, for \$210 ; that Vilas and Jones executed said note as sureties for said Church, and not otherwise, and added the word "surety" to their signatures thereto.

The complainants alleged that, by reason of the ten dollars agreed to be given and paid by said Church, for the loan or forbearance of said sum of \$200 for the time aforesaid, and included in the said note, exceeding the rate of seven dollars upon one hundred dollars for one year, the said note was usurious and void.

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The bill stated that, on or about the day when the said note became payable, it was further corruptly and unlawfully agreed, by and between the said Jones and said Church, that said Jones should forbear and give day of payment of the said sum of money, in the said note specified, for the further term of six months; and that said Church, for such forbearance, should pay to said Jones the sum of ten dollars. And that said Church, in pursuance of such agreement, gave to said Jones the sum of ten dollars; and in consideration thereof, said Jones, without the knowledge or consent of the complainants, agreed with said Church to forbear and give further day of payment of said note for six months then next ensuing. And complainants insisted, that by reason thereof, they were in equity discharged from all liability on said note; and the same became, and was, void for usury.

The bill stated that, on or about the 23d of April, 1840, a like corrupt and unlawful agreement was made, entered into, and consummated by and between said Jones and said Church, that said Jones should forbear and give day of payment for six months thereafter, on payment of the further sum of ten dollars. And that, on or about the 23d October, 1840, a similar agreement was entered into, and consummated between said Jones and said Church, for a further extension of the time of payment of said note for six months thereafter. And on or about the 23d of April, 1841, a like agreement was entered into, and consummated between said Jones and said Church, for the forbearance of payment of said note for six months thereafter, said Church paying seven dollars, and agreeing to pay three dollars more at a future time. And that, on or about the 23d October, 1841, a like agreement in all respects, between said Jones and said Church, was entered into and consummated for the forbearance of payment of said note for six months thereafter, said Church agreeing to pay ten dollars at a future day; and whereof, five dollars was paid in the month of October, 1841. All of said agreements alleged to be without the knowledge or consent of complainants, or either of them, whereby, and by reason of each of said extensions, said

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complainants were, and in equity ought to be, discharged from all liability on said note ; and the same became, and was, void for usury.

The bill alleged that, at the time when said note became due and payable, said Church was in good circumstances, and the note might have been collected of him, if sued with due diligence after the same became due ; but at the time of the expiration of the last extension, or day of payment, said Church had become and was then wholly insolvent.

The bill further stated that, on the 11th April, 1842, a suit was commenced in the court of common pleas, in the county of St. Lawrence ; wherein William Piercy, grocer, of Ogdensburgh, was plaintiff, and said Vilas, Bacon and Church were defendants, of a plea of trespass on the case upon promises, by filing a declaration and service of copies pursuant to the statute ; by which the plaintiffs declared upon the aforesaid note of \$210, made payable and delivered to said Jones as aforesaid. And said declaration alleged that said Jones, to whom, or to whose order, the payment of the said sum of money in the said promissory note specified was to be made, after the making thereof, and before payment of the said sum of money specified, endorsed the said promissory note, and ordered and appointed the said sum of money, in said note specified, to be paid to said plaintiff, and then and there delivered the said promissory note, so endorsed, to said plaintiff ; whereby it was averred that said Church and complainants became liable to pay to said plaintiff the said sum of money in said promissory note specified, &c.

It was also stated that said complainants appeared in said suit, and pleaded the general issue, and gave notice, without verification, that they would insist upon, and prove, upon the trial of said cause, in bar of the plaintiff's action against them, the facts herein before in substance stated, showing the said note to be void for usury, and to have been given upon a usurious consideration ; and, also showing that said Jones, for the consideration herein before mentioned, forebore and gave day of payment of the money mentioned in the said note, to said

Church, for the space of six months, at several different times, (naming them,) after the same had become due and payable, by the terms and conditions thereof, without the knowledge or consent of the complainants.

On the 12th of May, 1842, said cause was brought to trial. That complainants caused said Timothy Jones to be duly subpoenaed as a witness to attend said trial, on the part of said complainants, and expected to be able to prove and establish by his testimony, all and every of the facts herein before stated, relative to the giving of the said note, the consideration thereof, the usurious interest paid and agreed to be paid thereon, and the extension given to the said Church, without the consent of the complainants; and all the other facts herein stated, necessary to be shown, to establish a good and perfect defence in said suit. That on the trial of said cause, said Jones was called as a witness, and being, at the instance of plaintiff's counsel, sworn as to his interest in the event of said suit, on his *voir dire* oath, did testify that he was the owner of the said promissory note, that the said suit was brought for his benefit, and that the said William Piercy had no interest therein, and he did thereupon object to give evidence as a witness in said cause. And the court sustained the objection, and gave their opinion, and decided that said Jones could not be examined, or sworn in chief, as a witness in the said cause, without his consent. That previous to the trial, one of the counsel for complainants applied to said Jones, to learn who was the owner of said note; and said Jones informed him that he had sold the said note to said William Piercy, and that he was then the owner of it. That complainants believed they should be entitled to the benefit of the testimony of said Jones on said trial. That the facts stated, relative to the consideration of said note, and the giving further day of payment thereon, rested exclusively in the knowledge of said Jones and said Church, and could not be proved by the testimony of any other person; therefore the complainants were unable to prove, and establish the matters of their defence on said trial at law. And the plaintiff obtained a verdict therein against the complainants

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herein, for \$197.34 damages, being the amount claimed to be due on said note, and six cents costs; upon which judgment was afterwards perfected against said complainants and said Church, with \$40 costs. That said Church suffered judgment to pass against him by default, and refused to put in a plea, or defend said suit, or to join with complainants in this bill of complaint, to be relieved from said judgment. That on the 14th June, 1842, complainants did execute under their hands and seals, and deliver a good and sufficient release and discharge, to said Church, of and from all liability to complainants, for or by reason of complainants having executed with him said promissory note, or by reason of any suit brought, costs or damages incurred, or judgment recovered in consequence of such note.

That said Church did, on the 17th of March, 1842, present his petition to the district court of the United States, for the northern district of New-York, applying for the benefit of the act of congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," passed August 19, 1841. And on the 6th of May, 1842, said Church was, by a decree of said court, duly declared a bankrupt; and that he did, on the 16th of May, 1842, present to said court his petition, praying a full discharge from all his debts. And complainants believed said Church would receive such discharge before an order to take proofs could be entered in this cause; so that said complainants could have the benefit of his testimony, to prove and establish the facts herein before set forth, relative to said note.

The bill called for an answer to its allegations without oath, and a discovery from defendants respecting the usurious transactions alleged. And for an injunction restraining defendants from proceeding to execute or collect the judgment aforesaid.

After the bill, followed an affidavit of Harvey Church, swearing to all the circumstances as alleged, in the stating part of the bill in reference to the usury, and affirming the same as true.

The defendants respectively demurred, generally, to the bill

for want of equity. The cause was referred to assistant vice-chancellor SANDFORD, of the first circuit, who, on the 21st of July, 1843, allowed the demurrers and dismissed the bill.

The chancellor, on appeal to him, on the 22d of January, 1844, affirmed the decree of the assistant vice-chancellor, with costs.

Vilas & Bacon, the complainants, appealed to the court of errors, which appeal was afterwards duly transferred to this court.

*William C. Brown, attorney, and
Samuel Stevens, counsel, for appellants.*

First. The bill of complaint in this case, sets forth two grounds or causes for the relief prayed. If the complainants are entitled to the relief prayed upon either of the grounds or cases made by the bill, the demurrers, being general to the whole bill, must be overruled. (*Story's Eq. Plead.* § 443 ; *Kimberly v. Sells*, 3 J. C. R. 467 ; *Castleman et al v. Veitch*, 3 *Randolf*, 599 ; *Varrick v. Smith*, 5 *Paige*, 137, 160.)

Second. The complainants are entitled to the relief prayed, on the ground of usury stated in the bill, and admitted by the demurrers to be true.



1. The note which the complainants signed as sureties for Church, was most clearly void for usury. The complainants are to be deemed the borrowers within the equity of the act of 1837, as far as it regards the remedy given by that act. (*Laws of 1837*, p. 487 ; *Perine et al v. Striker*, 7 *Paige*, 598.)

2. The complainants were unable to avail themselves of this defence in the suit at law. Church was made a joint defendant with the complainants in the suit at law, and, therefore, could not be examined as a witness. Jones, the payee of the note, although he declared before the trial that he had sold the note to Piercy, the plaintiff on the record at law, yet, on the trial, he swore he then was and always had been the owner of the note, and that the suit was brought in the name of Piercy for his (Jones') benefit, and refused, for that reason, to be ex-

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amined as a witness for the defence in the cause, and the court decided that he could not be examined as a witness by the defendants in the suit at law, without his consent. (*Cook v. Spaulding*, 1 *Hill*, 586.)

These two were the only witnesses by whom the defence could be proved. This presents a case upon which a court of equity will relieve after judgment. (*Norton v. Woods*, 5 *Paige*, 249; *Morse v. Hovey*, 1 *Barbour's Ch. Rep.* 404.)

 We had not sworn to usury, and so could not call plaintiff. Besides, the law, *as then settled*, could only call plaintiff on record. Subsequent change of law (reversal) should not prejudice complainants. [Don't state that relied on representation of Jones that he had sold the note. And did not, in fact, rely on it, but called Jones. Besides, bill don't allege that defence was not sworn to. Finally, if did not give notice and make affidavit, was his own neglect.] 

3. Church is not a necessary party to the bill. He suffered judgment by default in the suit at law. He refused to join in this bill for relief on account of the usury. He is therefore too late to obtain any relief in this court; none is prayed for him, and none could be granted to him on this bill. The complainants have released him from all liability to them. Any decree that could or can be pronounced in this cause, could in no manner affect his liability, on the judgment obtained against him at law. He, therefore, being entitled to no relief himself, and none of the parties being entitled to any relief or decree against him, it is difficult to conceive what principle of equity would make him a necessary party to the suit. (*Story's Eq. Plead.* § 231.)

Whether he would be a competent witness on the part of the complainants to prove the usury alleged, or whether the complainants will be able in any way to prove the case made by their bill, are not questions which can by possibility arise on this demurrer.

The omission to make a person a party to a bill, who is entitled to no relief himself, against whom no relief or decree can be had by any party, and who has no interest whatever in

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the suit, can at most be mere matter of form, and objections to matter of form cannot be taken *ore tenus* on the argument of a demurrer. (*Story's Eq. Plead.* §§ 443, 455, 229.)

Third. But the objection that Church is a necessary party, if at all tenable, only goes to defeat the right to relief on the ground of usury. He is not a necessary party to relief on the ground that the complainants, as sureties, have been discharged, by the agreement between the principal debtor and the creditor, to extend the time of payment, without the consent of the parties. (*Miller v. M'Can*, 7 *Paige*, 491; *Varrick v. Jackson*, 2 *Wendell*, 201.)

One good ground for relief is sufficient to sustain the bill, although a dozen untenable grounds may be stated in it.

Fourth. The extension of the time of payment given by Jones, the creditor, to Church, the principal debtor, without the consent of the complainants, who were mere sureties, discharged them, and entitles them to all the relief sought by the bill. (*Rathbone v. Warren*, 10 *J. R.* 587; *King v. Baldwin*, 17 *J. R.* 384; *Miller v. M'Can*, 7 *Paige*, 451; *Burge on Suretyship*, 197, 211.)

It is therefore humbly submitted, that the decree of the court of chancery should be reversed.

REPLY.—*Clarke Rep.* 517—[*Edwards*—that has been reversed in chancery]—(*Paige*, 226;) [*Stevens*—no matter, I wish to show how jurists have regarded this matter.]

Charles G. Myers, attorney, and
James Edwards, counsel, for respondents.

First. The appellants, having suffered judgment at law to pass against them, on a trial upon matters which, if proved, constituted a defence at law, and of which they were fully cognizant before the trial, cannot be relieved from such judgment in equity. (*Simpson v. Hart*, 1 *Johns. Ch. R.* 91; [14 *J.* 63;] *Gelston & Schenck v. Hoyt*, 1 *Johns. Ch. R.* 543; *Barker v. Elkins & Simpson*, 1 *Johns. Ch. R.* 465; *Norton v. Woods*, 5 *Paige*, 249; *Bates v. Bagley*, 1 *Breese's R.* 60; *Cown v. Price*,

Vilas & Bacon agt. Jones & Piercy.

1 *Bibb's R.* 173; *Penny v. Martin*, 4 *Johns. Ch. R.* 566; *Northrup & al. v. Survivor of Lane & al.*, 3 *Dessaussure's Rep.* 324; *Bateman v. Wilson*, 1 *Sch. & Lefroy R.* 201, 204; *Williams v. Lee*, 3 *Atkins' R.* 223; *Green v. Dodge & al.*, 6 *Ham. R.* 80; *Thompson v. Berry & al.*, 3 *J. Ch. R.* 395; *Thompson v. Berry & al.*, 17 *J. R.* 446, *on appeal*; *Duncan v. Lyon*, 3 *J. Ch. R.* 351; *Campbell v. Morrison*, 7 *Paige R.* 157; *M^cVicker v. Woolcot*, 4 *J. R.* 510; *Cowen & Hill's Notes*, 949, 950; [6 *John. Ch.* 87.]

☞ Only exceptions, 1, where verdict obtained by fraud—2, surprise or accident, which could not be guarded against. *Laws* 1837, p. 487, § 3—might file bill against real party—every person. ☞

Second. The appellants, coming into this court to set up a defence which they might have interposed at law, must do equity before asking it; and as the verdict was for no more than the original loan with the lawful interest on it, after deducting the payments, equity will not relieve them therefrom on the ground of usury.

☞ [Mr. Stevens—I will admit verdict is for no more than sum loaned and interest—deducting all the payments.] *Edwards*—that fact will fully appear by calculation from facts stated in the bill. [Stevens—made admission in answer to that suggestion.] ☞

Third. If the court erred in excusing Jones from testifying, the remedy was by a bill of exceptions, and not by a bill in equity. (*Henry & Pierce v. The Bank of Salina*, 5 *Hill*, 523; *Stevens v. White*, 5 *Hill*, 548.)

DECISION.—Decree affirmed. For affirmance—JEWETT, Ch. J.; BRONSON, GARDINER, RUGGLES, and GRAY, JJ. For reversal—JONES, JOHNSON and WRIGHT, JJ.

NOTE.—BRONSON, J., *held*, that a bill to annul a contract on the ground of usury, would not be entertained, without the debtor did equity by returning, or offering to return, what he actually received with interest.

That, the complainants being mere sureties for the repayment of the money loaned, they did not come within the statute (2 *R. S.* 772, § 8; *Stat.* 1837, p. 487, § 4,) as “borrowers.” That there was no solid ground for saying that the

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word "borrower" included one who did not borrow, and who had no other connection with the transaction than that of becoming a surety for the man who did borrow.

That Church, who borrowed the money, refused to join with the complainants in filing the bill; and he was not a party to it in any form. As the bill was not filed by the "borrower," the case did not come within the provision of the statute which relieves him from the necessity of paying, or offering to pay, the money actually loaned. The complainants were entitled to no such favor, because the statute did not give it to them; and when they go into chancery, they are met by that cardinal principle of the court, that he who asks equity must do equity; and as they had not paid, nor offered to repay the money loaned, with interest, the bill was properly dismissed as far as related to the question of usury.

There was another reason why the case did not come within the statute; and that was, that the statute provided a remedy or defence, and must be understood as applying only to a remedy or defence, which is set up or pursued before the matter has passed into a judgment.

There were two reasons why this case did not come within the statute—

1st. The bill was not filed by the borrower of the money; and

2d. It was not filed until after a judgment had been recovered on the note.

And as the statute must be laid out of view, the bill was properly dismissed, because the complainants did not offer to return the money actually loaned, with interest.

Another objection was, that where a party goes into chancery, after a trial at law, he must be able to impeach the justice and equity of the verdict; and it must be upon grounds which either could not be made available to him at law, or which he was prevented from setting up by fraud, accident, or the wrongful act of the other party, without any negligence or fault on his part. The defence was available at law, and the only difficulty which the complainants met with was to prove it.

If Jones told a falsehood, in relation to the ownership of the note previous to the trial, there was no allegation in the bill, that the complainants were deceived or misled by it, or that they omitted to do anything which would have been done had Jones spoken the truth.

If Jones was excused from swearing to the usury, on the ground that he was the plaintiff in interest, and not the plaintiff on record, (*Usury Act*, 1837, § 2,) it was an error in the ruling of the judge, and the remedy was by bill of exceptions.

Also, *held*, that Church should have been made a party; that the defence of usury was common to all; the whole controversy could not be settled in this suit; for another bill might be filed by Church, and the defendants be subjected to a double litigation.

The complainants set up a second ground of defence to the note, that they were sureties for Church; and that, after the debt became due, Jones, without their knowledge or consent, gave further day of payment to the principal debtor.

The first answer to this was, that the complainants had tried, or had the op-

portunity of trying that matter at law, where it was as good a defence as it was in equity; and no sufficient reason was shown for a subsequent appeal to the court of chancery.

Second. Merely giving further time of payment to the principal debtor, without the consent of the surety, was no defence for the latter; time must be given in pursuance of a valid contract, founded upon a sufficient legal consideration for that purpose, which ties the hands of the creditor, so that he could not sue if he would. In this case, Jones kept the note in his hands, and might have brought a suit upon it at any time after it fell due, unless he was restrained by some binding agreement. Each and every extension of time mentioned in the bill, was made upon an usurious contract, such as was expressly declared to be void by statute; it has declared void *all* contracts infected with usury. Though the debtor parts with the money, it still belongs to him; and he might sue the next moment and recover it back.

GARDINER, J., concurred in the result of the opinion delivered by BRONSON, J.; and as to all the points therein discussed, except that which holds that a surety was not a borrower within the provisions of the act of 1837.

JEWETT, Ch. J., was in favor of affirming the decree, upon the grounds—

1st. That so far as the bill sought relief on the ground of usury, he was of opinion, that after a trial at law, it was too late, under the circumstances, for the complainants to resort to a court of equity. The bill did not pretend that they were in anywise misled by the false statement of (Jones) the payee of the note, that he had transferred it; and if they had verified their notice of the defence of usury, according to the provisions of the act of 1837, they might have called the payee, as the plaintiff in interest, and examined him as a witness.

2d. That the alleged agreements, whether executory or executed, to forbear the payment of the note, in consideration of usurious premiums paid for such forbearance, were wholly void, and therefore could not be set up by the sureties as a ground of discharge.

Reported 1 Comstock, 274.

DEXTER & VEAZIE, plaintiffs in error, *agt.* ADAMS, sheriff, &c.,
defendant in error.

Questions discussed.

1. Whether a plaintiff can maintain an action against the sheriff, for an *escape* of a prisoner confined to the jail limits, if the escape be procured by the fraudulent contrivances and devices of the person employed by the plaintiff to commence the suit, without the authority, knowledge or assent of the plaintiff of such fraudulent acts?

2. Whether the plaintiff can adopt such an escape, procured for his benefit, and repudiate the means by which it was procured; or whether he must not adopt all or none of the unauthorized acts of the person acting as his agent, and for his benefit?

3. Whether fraud was committed in this case upon the prisoner, to induce him to leave the limits?

4. Whether it should not have been left to the jury to say that, if they believed that the prisoner was aware at the time he went where he did, he forfeited his limit bond and made the sheriff liable for an escape, whether the message to decoy him off was true or false, and with such knowledge, went deliberately off the limits, that then the sheriff was liable, though the message sent to get him off was false?

5. Whether the court erred in admitting the testimony of the prisoner after a release by the sheriff, or whether such release divested him of his interest in the event of the suit?

6. Where it was alleged that an objection was not taken at the circuit, had it have been, it might have been obviated, whether this court would listen to it?

CHAUNCEY DEXTER and Provost Veazie, plaintiffs, by *Wm. J. Hadley*, their attorney, sued Amos Adams, sheriff of the city and county of Albany, in the Albany mayor's court, in debt, for the escape of one John F. Jenkins from the jail limits of the city and county of Albany. Jenkins being in custody of the sheriff upon a *ca. sa.* issued at the suit of the plaintiffs for \$125.50 upon and by virtue of a certain judgment rendered in the mayor's court of the city of Albany, on the 14th February, 1842, in a plea of trespass on the case, recovered by

• Dexter & Veazie *agt.* Adams.

said plaintiffs against said Jenkins; and which was then unpaid and unsatisfied.

The defendant, by *Cagger & Stevens*, his attorneys, pleaded *nil debet*, and a special plea that said Jenkins wrongfully, privily, and without the knowledge of the defendant, escaped from and out of the custody of the said defendant, as such sheriff, to places to the said defendant unknown; but that said Jenkins, before the defendant had notice or knowledge of the escape, and before the commencement of this suit, voluntarily and of his own accord returned back again into the custody of said defendant; and that defendant did thereupon keep and detain him in execution as aforesaid; and that, before and at the time when this suit was commenced, said Jenkins was in the actual custody of the defendant as such sheriff, in execution at the suit of said plaintiffs, under and by virtue of said commitment; and that defendant had no notice or knowledge of said escape, at any time before the commencement of this suit.

The plaintiffs put in a replication, taking issue upon the second plea. The cause was tried before his Hon. WILLIAM PARMELEE, recorder of the city of Albany, on the 10th January, 1843; and the jury found a verdict for plaintiffs upon both issues. The defendant, upon a bill of exceptions, carried the cause to the supreme court; where, at the July term, 1843, the judgment of the mayor's court was reversed, and a *venire de novo* awarded to the circuit court for the city and county of Albany, with costs to abide the event. (*Reported 2 Denio, 646.*)

On the 25th of January, 1847, before the Hon. AMASA J. PARKER, at an adjourned circuit court, held in and for the county of Albany, the said cause was brought to trial.

The plaintiffs gave in evidence the recovery of the judgment in an action of *tort*, in the Albany mayor's court, upon which Jenkins was committed—the *ca. sa.* issued upon said judgment, with the return of the sheriff endorsed that he had arrested said Jenkins, and committed him to the liberties of the jail, by virtue thereof, on the 11th of June, 1842.

William J. Hadley was then called as a witness on the part of the plaintiffs, who was objected to by the defendant's counsel on the ground of interest, to prove which the counsel for the defendant called

John Baker as a witness, who testified, that he heard *Dexter*, one of the plaintiffs in this suit, say that *Hadley* was the owner of the judgment; this was in August, 1842 or 1843; can't say which; thought it was after August, 1842, that he had heard *Dexter* say so. Whereupon the counsel for the plaintiffs gave in evidence a bond of indemnity, signed by *Henry G. Wheaton* and *Edwin A. Doolittle*, to said *Hadley*, in the penalty of \$2,000, conditioned to indemnify said *Hadley* from all damages and costs of every name and nature, to which he might or could be subjected in any manner in this suit; also an assignment from said *Hadley* to one *Benjamin Duel* of said judgment, and all his claim and interest therein, and in this suit, which assignment was dated on the 13th February, 1843, and acknowledged before a commissioner on the 15th day of October, 1843. The counsel for the defendant admitted that *Messrs. Wheaton & Doolittle* were perfectly responsible for the amount of the bond, but insisted that said assignment and said bond did not render said *Hadley* a competent witness. The court overruled the objection, and the defendant excepted.

William J. Hadley, sworn for plaintiffs, (after the plaintiffs' counsel had offered in evidence a *capias*, tested the second Tuesday of July, 1842, and returnable the second Tuesday of August, then next,) testified,—I issued the *capias* now shown to me; I was the attorney at the time; I delivered it to *John Baker*, the latter part of July, or the beginning of the month of August, 1842, with instructions if he ever saw *John F. Jenkins* off the limits, to deliver it to a messenger and instruct him to take it forthwith to *Mr. Allen* the coroner. *Baker* had not any other *capias* in my handwriting at that time. This *capias*, and the endorsement on it, is in my handwriting, except the coroner's return, and the time of receipt and filing of it.

Being *cross-examined*, he testified,—there was another *capias*

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of the same teste and return in the hands of George Jenkins. I issued that one, and it was issued for the same reason as the one in question. I don't recollect what instructions I gave George Jenkins when I delivered him the writ, but, I have no doubt, substantially the same as those I gave Baker. I had, before that, issued another *capias* for the same purpose, tested in June and returnable in July; I delivered that to Baker; I think I delivered the first *capias* to Baker in the police office, with the same instructions as those before stated; I did not request Baker to watch to see him off the limits; I think I told Baker that Jenkins had connections in Hudson, and that I understood he was in the habit of going down there. My object in telling him this was, that if Baker should see Jenkins on the boat going down, then the suit should be commenced; I supposed he would go on the boat if he went down at all; I don't recollect certainly where I delivered the second *capias* to Baker; I think it was in the police office; I do not recollect that I have issued or made out any other *capias* than those three. I watched once to see if Jenkins went off the limits; I don't remember whether any person was with me then with a *capias*; I was the owner of the judgment at the time I issued the first *capias* in this case. I don't recollect the precise time when I became the owner of the judgment; I was the owner of the judgment at the time the *ca. sa.* was issued; I bought the judgment through Mr. Wheaton; I was in an alley leading from Grand street one afternoon, between the hours of 2 and 6 o'clock, sometime between the months of May and August, 1842; I can't now tell nearer the time; I could see, out of that lane, persons as they passed down Grand street; this alley is on the east side of Grand street; I can't say that I expected to see Jenkins pass there; I went there, thinking it likely he would pass down there; Mr. Loveridge, the then police magistrate, told me he thought it likely he would pass down there; he told me this in the police office; I don't recollect who was present at that time; I can't say whether it was the same day or the day before, that I went into the alley to watch for Jenkins; I don't recollect whether

I saw Baker or Mink at the police office that day. I think I saw Jenkins in Lydius street, just as I was coming away ; I staid there probably half an hour, perhaps longer ; I was told there was a Mrs. Carmichael living down there, where Worcester used to go. Mr. Loveridge told me this as clerk to the district attorney ; I had suspicions that Jenkins was going there to see Worcester ; I was told by Mr. Loveridge, that Jenkins would be likely to go down there to see Worcester. Mr. Loveridge told me, Jenkins had made a complaint against Worcester before him, for obtaining money from him by false pretences, and he thought Jenkins would go down to see if he could not arrange it with Worcester, and he wanted me to tell Mr. Wheaton, who was then district attorney, that Worcester was in town, and might be arrested by the officer who had the bench warrant. Worcester had then been indicted for perjury, and had absconded from the city, as I understood ; I think there was not more than one person with me there ; I don't recollect having any conversation with Mink or Baker the next day at the police office ; Baker and Mink were then police constables ; I was then clerk to the district attorney, and superintended the issuing of subpœnas, &c. George Jenkins was principally the officer employed by the district attorney ; I don't think that Baker, and Mink, and Jenkins did the principal part of the business of the district attorney ; Nixon did as much, or more than either Baker or Mink ; and some other officers did as much as they did. Baker and Mink were, however, employed in serving process. I knew a constable by the name of Frisby, in 1842 ; Frisby occupied the upper part of the same house that I lived in at that time ; that house was off the limits. I don't know that a note was put in the Mechanics' and Farmers' Bank, with Frisby's endorsement ; Jenkins was notary to that bank. I went down to dinner one day, when I thought it likely he would come down to protest a note, which I supposed was Frisby's note ; I don't know whether he was coming to demand payment or to give notice of protest. Baker and Mink came to my house on the morning on which it is said the escape took place ; Baker told me that Mink had

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delivered the *capias* to Allen ; this was shortly after 7 A. M. I should think ; I think they rang the bell ; I was up at that time ; I can't tell precisely the conversation that took place then ; the first thing I recollect, is Baker saying that Mink had delivered the *capias* to the coroner ; I don't know that he said that in those very words ; he did not, nor did either of them in effect say, " now counsellor, we've got him at last." I will not swear positively that I did not ask either of them whether they were sure they had done it up right ; I don't recollect whether I saw them in the office the same day ; I think it likely that something was said about the suit in the office that day ; whether Baker and Mink were there or not, I can't say ; I do not recollect what I got for this judgment when I sold it ; I transferred it in a settlement with the present owner, who is my father-in-law ; I can't tell how many trials had been had in this suit when I transferred it ; I think it was transferred the day the assignment bears date, which is the 15th September, 1843. I think this cause had been tried as often as twice before the assignment was made. It was not a part of my object, in assigning the judgment, to enable me to be a witness ; I knew, as matter of law, that as long as I was the owner of the judgment I could not be a witness ; I owed my father-in-law at the time of the assignment ; he was not pressing me for payment. I do not know that he had any particular anxiety to have this judgment. Esquire Loveridge is dead.

Being *re-examined*, he testified,—Worcester had been indicted for perjury, and had absconded, and had not been arrested at the time Loveridge spoke to me.

George Jenkins, sworn for plaintiffs, testified,—I know John F. Jenkins ; on the 4th of August, 1842, I was on the pier in the morning ; I saw John F. Jenkins there ; it wanted about 10 minutes of 7 ; I first saw him coming off State street bridge on the pier ; he walked on to the dock, and after waiting a few minutes, went on board the steamboat next to the pier ; I think it was the Albany he went on board of ; I don't recollect whether there was any other boat between her and the pier ; I saw him as much as 40 feet from the pier, east of the pier ;

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I was in the steamboat office on the south side of State street bridge, in the second story, at the time he was this distance from the pier; Baker and Mink came into the room two or three minutes before I saw Jenkins pass it; and a few minutes before, I cannot state the precise time, I then saw Baker hand Mink a paper while Jenkins was this distance from the pier, similar to the one shown me; it was in Hadley's handwriting, and this *capias* is in Hadley's handwriting. When Baker handed the paper to Mink, he told him to take it to Mr. Allen, or to the coroner, and they then went down stairs. My impression is, that Jenkins went on the outside guards of the boat; the distance where he was, was at least 40 feet from the dock.

Being *cross-examined*, he testified,—I got to the pier before 7 o'clock that morning; I don't recollect whether Mink or Baker was there before I got there or not; I think they came up a few minutes before I saw Jenkins; I know Matthew Wellington, the driver of the Congress Hall omnibus; I believe I saw him there that morning; I think I saw Mink step on to the wheel and speak to Wellington, before he and Baker went up into the steamboat office; this was before I went up into the steamboat office; I don't recollect that I saw Baker with Mink at that time; I saw them together either a few minutes before or after that; I was watching for Jenkins, and I supposed Baker and Mink were watching for Jenkins. When John F. Jenkins came in sight, Baker and Mink were together in the steamboat office, and Baker said "there he goes," or "here he comes." (This expression of Baker's was objected to by plaintiffs' counsel, and the objection overruled, and plaintiff excepted to the decision.) John F. Jenkins was then coming across the bridge towards the pier; I was sitting at another window in the steamboat office, or a short distance from Baker and Mink; I can't say whether I had any conversation with Baker and Mink that morning, before I went up into the steamboat office; I do not know the width of the Albany; I should think she was more than 40 feet wide.

On being *re-examined*, he testified,—I was one of the city constables at that time, but not one of the police constables;

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it was not a part of my duties to attend at the departure of boats.

Benoni C. Allen, sworn for the plaintiffs, testified,—I was one of the coroner's in 1842, (and being shown the *capias* by which this suit was commenced, said) I received that *capias* the 4th of August, 1842, a little past 7 o'clock in the morning; Mink gave it to me; Baker and Mink came together. (It was then proved that the limits extended only 30 feet east of the pier. Here the plaintiffs rested.)

The defendant, to maintain the issue on his part, called as a witness—

Stewart Rose, who, being sworn, testified,—I knew Matthew Wellington; he is dead; he died a year ago last fall or last spring; I saw him after he was dead.

Samuel Stevens, sworn for defendants, testified,—I tried this cause in April, 1845; I examined Matthew Wellington, and took minutes of his testimony, and believe my minutes contain a true statement of his testimony. The following is the evidence of said Wellington, as read to the court:

Matthew Wellington was then introduced as a witness on the part of the defendants, and testified that he was in the employ of Mr. Landon, in the summer of 1842. Mr. Landon kept the Congress Hall, near the capitol, in the city of Albany, and witness was employed by him to drive his omnibus, to take passengers from Congress Hall to the steamboat, and from the steamboat to Congress Hall, during the summer of 1842, and had been so employed for about a year before that time; witness recollects being on the pier with the omnibus one morning in August, 1842, before 7 o'clock in the morning, at a time when he was requested to carry a message to John F. Jenkins; witness don't recollect the day of the month. Charles Mink was the person who requested witness to take the message to Mr. Jenkins; Mink came up to witness on the omnibus, and requested witness to stop at the house of John F. Jenkins, and tell him that Mr. E. C. Delavan was on board the steamboat Albany, and wanted to see him (Mr. Jenkins) before the boat started for New-York, at 7 o'clock; Mink gave witness two

shillings to deliver the message, and told witness that he (witness) need not tell Mr. Jenkins who sent the message to him ; witness was acquainted with Mink ; witness drove up to Mr. Jenkins' door, at the corner of State and Chapel streets, and saw his girl sweeping at the door, and asked if Mr. Jenkins was in ; she said he was, and witness delivered the message to her ; witness had a conversation with Mink, about this transaction, the evening of the next day.

The counsel for the plaintiffs objected to that conversation being given in evidence, and the objection was sustained by the court, and the defendant's counsel excepted. The defendant's counsel then offered to prove that, in that conversation, Mink admitted the message which he sent by the witness was false, and was intended to get Jenkins off the limits, and exulted in the success of his plan in getting Jenkins off the limits. This was objected to by the counsel for the plaintiffs, and excluded by the court ; to which decision the counsel for the defendant excepted.

The witness further testified,—that it was between half-past six and seven o'clock in the morning, when Mink requested him to deliver this message to Mr. Jenkins. No other occurrence of this kind ever took place between witness and Mink ; witness did not take notice of John Baker and George Jenkins being there that morning ; witness heard that same evening, that the sheriff had been sued for Jenkins going off the limits that morning.

On being *cross-examined*, the witness further testified,—that the morning Mink requested witness to take this message to Mr. Jenkins, was the latter part of July or beginning of August ; witness first saw Mink that morning on the pier, at the foot of State street, a minute or so before he gave witness the message ; he was not doing anything, that witness saw ; he was coming towards the omnibus where witness sat ; did not see any other person with him ; witness was sitting on the omnibus ; witness' omnibus was not moving,—the way was stopped so that witness could not drive on ; then witness told the girl at Mr. Jenkins' door that Mr. Delavan was on the steamboat

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Albany, and wanted to see Mr. Jenkins, and told her Mr. Jenkins had got to be down there before 7 o'clock, for the boat would go away at that time; witness don't recollect that he told him anything else.

John F. Jenkins, offered as a witness on the part of the defendant, was objected to on the ground of interest, to obviate which a release was produced in the words following :

Albany Mayor's Court :

[*Title of the cause.*].—Know all men by these presents, that I, Amos Adams, sheriff of the city and county of Albany, the defendant above named, in consideration of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, have, and by these presents do forever release and discharge John F. Jenkins of and from all liability and responsibility to me of every kind or nature whatever, upon or under a certain bond, executed by him and Thomas W. Olcott to me, as sheriff of the city and county of Albany, in the penalty of two hundred and fifty dollars, bearing date the eleventh day of June, 1842, conditioned that if the said Jenkins should remain a true and faithful prisoner of said sheriff, and should not at any time, or in any manner, escape or go without the limits or boundaries of the liberties established for the jail of the county of Albany, until discharged by due course of law, then said bond was to be void, else to remain in full force and virtue.

Witness my hand and seal this 10th day of January, 1843.

AMOS ADAMS. [L. s.]

In the presence of

P. CAGGER.

Peter Cagger, sworn for defendant, testified,—I saw Adams execute the release, and deliver it to Jenkins; I drew the release; it was all done in my presence; it was done in court; there was no consideration passed between the parties; it was done at my request, but no money was paid at the time; defendant did not execute the release until Olcott (the bail to the sheriff) gave a written consent that he should do so.

John F. Jenkins, again offered as a witness on the part of the defendant, was objected to on the ground of interest, and sworn on his *voir dire*, and testified,—I executed a bond to the sheriff, together with Thomas W. Olcott, on my first commitment to the limits; it was the ordinary limit bond; I did not pay the sheriff anything for executing this release, directly or indirectly.

The plaintiffs' counsel still insisted that witness Jenkins was not competent; that there being no consideration for the release, it was void; and generally, that there lease did not discharge the witness Jenkins from liability under the circumstances of this case. The court overruled the objection, and decided that Jenkins was a competent witness; and the plaintiffs then and there excepted.

John F. Jenkins, sworn for defendant, testified,—in August, 1842, I was confined to the limits in this city; I was on the limits on a *ca. sa.* in favor of the plaintiffs in this suit; I was not confined or on the limits on any other judgment or process at that time; I lived then on the northwest corner of Chapel and State streets; I remember going to the steamboat on the morning of the 4th of August, 1842.

The counsel for the plaintiffs then objected to the defendant's proving that any message had been sent to Jenkins. The objection was overruled, and the plaintiffs then and there excepted.

The witness testified,—[I was awake by my wife on that morning, and told by her that a message had come from Mr. Delavan; that he wished to see me on board of the steamboat. In consequence of that information, I arose and dressed myself as soon as possible, and went down stairs, and there saw the girl Susan, and asked her who gave the information, or who called, and she said the driver of the Congress Hall omnibus.]

All of which evidence included in brackets, was objected to, and the objection was overruled, and the plaintiffs' counsel excepted.

I then left and went immediately down to the boat; after getting on the pier, I stopped a few moments to see if I could

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see Mr. Delavan, and not seeing him or any person that knew him, I went on to the boat and ascertained to my satisfaction that he was not there, and returned; I think it could not exceed two minutes from the time I left the pier to go to the Albany until I returned to the pier again; this message was the sole inducement to my going on to the boat.

Being *cross-examined*, he testified,—the reason why I stopped on the dock, was because I did not know but I should pass the limits if I went on the boat; I did not know where the limits extended into the river; I had the impression they extended to the centre of the river, though I was not certain of it; I went to the sheriff's office and examined the limits on the map kept there; the reason I did not remain longer on the boat was that I did not know but I might be off the limits.

Edward C. Delavan, sworn for the defendant, testified,—I resided at Ballston in the summer of 1842. John F. Jenkins was my agent for transacting my business in the city of Albany, during the summer of 1842, and had been for some time previous thereto.

The counsel for the defendant then offered to prove, by this witness, that the witness had not sent any message to Jenkins to come to see him on the steamboat Albany, on the morning in question, and that he (Delavan) was not then in the city of Albany. The receipt of this evidence was objected to on the part of the plaintiffs. The objection was overruled, and the plaintiffs then and there excepted.

The witness then testified,—I did not send any message by any person to Jenkins to come to me on the steamboat Albany, in the month of August, 1842, or at any other time; I did not go from this city to New-York during that month.

Here the defendant rested.

William J. Hadley, recalled for plaintiffs, testified,—I was never informed, prior to the first trial of this cause, of any fact by which Jenkins was induced to leave the limits; I never gave Mink any authority whatever, nor did I give Baker any other authority than what I have testified to; the first I heard of anything about the message being sent to Jenkins, or that

any means had been made use of, to induce him to leave the limits, was over a week after the suit was commenced ; and it was then reported to me that Mr. Cagger had said so ; till I heard this report, as from Cagger. I never heard that any means whatever had been used to get Jenkins off the limits.

The above was all the testimony given in the cause, and the testimony was announced to be closed. And the court then adjourned until the following morning. Upon the coming in of the court the following morning, his honor, the circuit judge, then determined he would strike out the inquiry put by Jenkins to his servant girl, upon his going down stairs on the morning in question, and her reply to the inquiry ; and ordered the same stricken out accordingly ; and declared the same was not evidence in the cause.

The counsel for the plaintiffs then insisted upon their right to recall the witness Jenkins, or to call other testimony. The court refused to allow the witness to be recalled, in to allow the plaintiffs to call other testimony ; and the plaintiffs then and there excepted.

His honor, the circuit judge, after stating to the jury the nature of the action, and of defendant's liability, charged them, as matter of law, that if they should find, from the evidence given in the cause, that the escape of Jenkins from the limits for which the defendant was sought to be charged in this case, was procured by the fraud of the agent whom Hadley, the then owner of the judgment, had employed to commence this suit, for the purpose of enabling Hadley to collect this debt of the defendant, the plaintiffs could not recover. That it was a conceded fact, that Baker was employed by Hadley, as his agent, to commence this suit ; Hadley made out the *capias* by which the suit was commenced, and gave it to Baker, with instructions, that if he saw Jenkins off the limits, to give the *capias* to a messenger, to be taken immediately to the coroner. If the jury should find, from the testimony, that Jenkins had been induced by trick, or fraud, or deception, on the part of Baker, either alone or in conjunction, and by concert with Mink ; and that such trick, or fraud, was resorted to by Baker for the bene-

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fit of Hadley, and to enable him to charge the defendant with this debt, although Hadley himself was ignorant of the means employed, they should find a verdict for the defendant ; whether Jenkins had been decoyed from the limits by any trick or fraud of Baker, or of Baker and Mink together, for the benefit of Hadley, and to enable Hadley, by this suit, to collect his debt against Jenkins, of the defendant, was a question solely for the jury upon the evidence ; and the burden of proving these facts, lay with the defendant, and it was for the jury to say, from the evidence, whether they had been made out.

His honor, the circuit judge, then recapitulated the evidence, and submitted the cause to the jury, with the instruction, that if they were not satisfied, from the evidence, that the escape in question had been procured or induced solely by the fraud and trick of Baker, or Baker and Mink acting in concert ; and also, that such fraud or trick, if any, was resorted to for the benefit of Hadley, to enable him to recover of the defendant the amount of the judgment for which Jenkins was committed to the limits, the plaintiffs would be entitled to their verdict for the amount of the judgment against Jenkins.

To the whole, and to each and every part whereof, the counsel for the plaintiffs then and there excepted.

The counsel for the plaintiffs requested the court to charge the jury, that it was no defence to this suit, if Jenkins, the prisoner, was induced by fraud or deception to leave the limits, unless it was shown that the then owner of the judgment was cognizant of it, or a party to the fraud or deception, or had authorized it. The court refused so to charge, and the counsel for the plaintiffs excepted.

The counsel for the plaintiffs also requested the court to charge the jury, that if Baker had no authority from the then owner of said judgment, to commit said alleged fraud, or to participate in it, and that if he (said Baker) was cognizant of, or participated in it, it was his own act and not the act of the owner, nor is he liable for it. The court refused to charge as requested, and the counsel for the plaintiffs excepted.

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The counsel for the plaintiffs also requested the court to charge the jury, that if knowledge or participation on the part of Baker, of the fraud by which Jenkins was alleged to have been induced to leave the limits, constitutes a defence, that then there is no evidence ; or, if any, not sufficient evidence of any such knowledge or participation. The court refused so to charge, and stated that this was a question of fact for the jury ; and the plaintiffs then and there excepted.

The counsel for the plaintiffs also requested the court to charge the jury, that if they believed that the prisoner, Jenkins, was aware, at the time he went on to the steamboat Albany, he forfeited his limit bond, and made the sheriff liable for an escape, whether the message he had received as to Mr. Delavan was true or false, and with such knowledge, knowingly, intentionally, and with deliberation, after some minutes hesitation, went on to said boat, off from the limits, that then the defendant was liable, though the message as to Mr. Delavan's wish to see him was false. The court refused so to charge, and charged the jury, that if Jenkins was in doubt as to the extent of the limits, and was induced to go over the line by the false message of Mink, sent for the purpose of enticing Jenkins off the limits, and enabling the owner of the judgment to sue the sheriff, and if Mink acted in conjunction with Baker, the agent of Hadley, in sending said false message, and procuring said escape, then the plaintiffs could not recover. To which refusal to charge, and to which charge, the plaintiffs' counsel excepted.

The counsel for the plaintiffs also requested the court to charge the jury, that if they believed Jenkins left the limits without being deceived as to any material fact, necessary or proper for him to know, in order to determine the question of his right to leave the limits, it does not constitute a defence. The court refused so to charge, and charged the jury, that if Jenkins was inveigled off the limits by a false message, and thus induced to leave the limits by the plaintiffs, or their agent, it was a defence, whether the fraud related to the question of extent of limits, or otherwise. To which refusal to charge,

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and to which charge, the counsel for the plaintiffs then and there excepted.

The jury found a verdict for the defendants.

The supreme court, at July term, 1847, affirmed, and rendered judgment upon the verdict at the circuit.

BEARDSLEY, J., delivered the opinion of the court as follows :

“ In my view of this case, there was no error in allowing Jenkins to be sworn and examined as a witness for the defendant. It was urged on the argument, that notwithstanding the release executed by the defendant, the witness still remained liable to Olcott, who was surety in the bond for the limits, and was bound to indemnify him against all damages which he might incur by means of the escape. This objection was not made on the trial ; and if it had been, it probably would have been obviated at once by a release from Olcott, as it appears he assented to the execution of the one made by the defendant. But the point, as now presented, not having been made on the trial, cannot be regarded, whatever might have been its effect if taken at the proper time.

“ Assuming that Jenkins, independently of his bond for the limits, would have been liable to indemnify the defendant for an escape, if one had occurred—a point upon which no opinion is intended to be expressed—such liability was merged in the higher security, the bond ; and did not exist when the release was executed. Besides, this point was not made on the trial. If the plaintiffs intended to insist that the release was defective in form, or in the manner of execution, they were bound to make the objection in a specific form, that the defect might be obviated. A general objection, such as was made, ought not to be regarded.

“ The main point in this case was disposed of when it was formerly before the court, (2 *Denio*, 646,) and it is only material now to advert to one aspect of the case which was not then presented.

“ The judge was asked, by the plaintiffs’ counsel, to charge that if Jenkins knowingly went beyond the limits, intending so

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to do, defendant was liable for that escape, notwithstanding the fraudulent misrepresentation by which Jenkins was induced to go where he did. The judge refused so to charge, and as I think correctly; for there was no evidence on which that point could arise. The only witness on this part of the case was Jenkins; and he testified that he did not know where the jail limit was at that place, although he thought it was in the centre of the river. Of this, however, he had no certain knowledge; and the jury would have been warranted in finding that he was in doubt whether the place to which he went, was or was not beyond the jail limit, although they could not, on this evidence, have come to the conclusion that he knew he was passing beyond the prescribed boundary. The judge charged that it was not enough to show that Jenkins was in doubt as to the boundary; and that, if he was induced to go beyond the line by the trick and fraud of the agent of the owner of the judgment, acting with a view thereby to aid such owner in collecting the amount of the sheriff, the action could not be maintained, although a doubt might have been entertained by Jenkins as to the place of the boundary of the jail liberties. There was no error in this, or any other part of the charge, and a new trial should be denied."

New trial denied.

The plaintiffs brought their writ of error, and came to this court.

H. G. Wheaton, attorney and counsel, and

R. W. Peckham, counsel, for plaintiffs in error.

First. The court erred in charging the jury, as in substance it did, that if they found that Jenkins was induced to leave the jail limits by the false message sent to him by Mink, and that Mink and Baker were acting in concert in sending the message, and that the message was sent for the purpose of enticing Jenkins off the limits, and enabling Hadley to collect his judgment of the sheriff, the plaintiff could not recover. And in refusing to charge the jury, that the fact of the prison-

er's being induced to leave the limits by fraud or deception, did not constitute a defence to this suit, unless Hadley, the owner of the judgment on which he was imprisoned, was in some way cognizant of, or a party to the fraud or deception, or had authorized it.

Because one man can never be held responsible for the fraudulent act of another, in a case like this, unless he has either authorized it before hand, or, it being done for his benefit, has approved of, or ratified it after it was done and had come to his knowledge. And it is clearly proved in this case, that the act complained of was not authorized by Hadley, the party sought to be held responsible for it, before it was done; and it is not proved that, after it was done and came to his knowledge, he approved of or ratified it.

1. The duty of the sheriff, as defined by the *Revised Statutes* and at common law. (2 R. S. 437, § 63; *Alsept v. Eyles*, 2 Hen. Black. 108; *Raines, ex'r v. Dunning*, 2 Mar. 386; *Elliott v. Norfolk*, 4 T. R. 789; 1 Rol. 808, L. 7.)

2. What will discharge the sheriff from liability consequent upon the escape of his prisoner? (*Cary v. Turner, sheriff*, 6 Johns. R. 51; *Kellogg v. Gilbert*, 10 Johns. R. 220; *Cargill v. Taylor*, 10 Mass. R. 206; *Sweet v. Palmer*, 16 Johns. R. 181; *Patten v. Halstead*, Cox's Rep. 277; *Vin. Ab. Escape, N.*; *Crompton v. Ward*, 1 Strange, 429.)

3. The nature and extent of the agency of Baker. (*Story on Agency*, § 126, §§ 17 and 18; *Fenn v. Harrison*, 3 T. R. 754; *Gibson v. Colt*, 7 Johns. 390; *Paley on Agency*, by Dunlap, 202, note a.)

4. On the subject of the ratification of an unauthorized act of an agent, or of a stranger, done with intent to benefit the principal. (*Story on Agency*, §§ 248, 249, 250, 252, 253, 254, 255, 256, 258; *Owings v. Hull*, 9 Peters, 607, 629; *Hays v. Stone*, 7 Hill, 128; *Paley on Agency*, by Dunlap, 171, note o.)

5. On the subject of the liability of the principal for the torts of the agent. (*Story on Agency*, §§ 452, 453, 454, 455, 456, 459; *Smith Merc. L.* 66.)

Second. No fraud was committed upon Jenkins to induce him to leave the limits, because—

1. No fact was misrepresented to him necessary or material for him to know, in order to enable him to judge of the propriety or legality of his leaving the limits—the misrepresentation alleged being confined to a fact, which could in no way mislead him as to his rights or responsibilities as a prisoner, and the truth or falsehood of which, so far as those rights or responsibilities were concerned, was entirely indifferent.

Third. The court erred in refusing to charge the jury, that if they believed the prisoner Jenkins was aware, at the time he went on to the steamboat Albany, he forfeited his limit bond, and made the sheriff liable for an escape, whether the message he had received as to Delavan, was true or false, and with such knowledge, after some minutes hesitation, went deliberately off the limits on to the boat, that then the defendant was liable though the message, as to Delavan's wish to see him there, was false.

Fourth. The court erred in admitting the testimony of John F. Jenkins, he being interested in the event of the suit; and the release executed by the sheriff did not divest him of that interest.

1. The release executed by the sheriff is confined entirely to the witness' liability under the bond he had executed to the sheriff, and described in the release, the surety being still liable to the sheriff on the bond. Now, suppose a recovery to be had against the sheriff, he would be entitled to recover the amount of the surety, and would not the witness be liable to the surety for the full amount he should have to pay the sheriff? The sheriff's release, therefore, to the witness, executed by the consent of the surety, left the surety liable to the sheriff, and the witness to the surety. The release, therefore, in no way relieved the witness from his interest in the event of the suit. His interest after the release, remained equally certain and fixed.

2. Without any bond, the witness was interested in the event of the suit. The sheriff was sued for a negligent, not

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for a voluntary escape. After the arrest, it was the duty of the prisoner to remain in custody, according to law. It was a wrong to the sheriff for him to leave the limits, and if the sheriff sustains damages in consequence of the prisoner leaving the limits, he is liable to the sheriff for the damages. Notwithstanding the release from the bond, the common law liability to the sheriff still remained. (*Alsept v. Eyles*, 2 *H. Black.* 108; *Appleby v. Clark*, 10 *Mass. Rep.* 59; *Vin. Ab. Escape*, 1. *Cro. E.* 237, 293, 53.)

☞ 9 *Wheat.* 651—sheriff may give the limits without a bond. 2 *R. S.* 434, §§ 47, 40. ☞

3. The objection to the witness Jenkins, on the ground of interest, after execution of the release, was sufficiently specific, unless the court or opposite party called for a specification of the particular in which it was alleged his interest remained. (3 *H.* 395; 17 *W.* 257.)

☞ *R. W. Peckham*, in reply.—*Question of agency is not in the case*, as tried and passed upon by the supreme court. Only question put to the jury was, whether act was done for plaintiffs' benefit. Ratification and adoption was the point tried. ☞

Cagger & Stevens, attorneys, and

Samuel Stevens & N. Hill, jr., counsel, for def't in error.

First. John F. Jenkins was a competent witness.

1. He was released from all liability on his bond to the sheriff.

2. That release having been given with the consent of Mr. Olcott, (the surety,) released Jenkins from all liability to respond to the surety.

3. The release was executed to enable Jenkins to be examined as a witness for the benefit of the surety, as well as the sheriff. This would be a conclusive defence to a suit by either of them against Jenkins, for any liability to them which would have rendered him incompetent as a witness. (11 *More*, 342; *C. & H.* 365, mentions the case.)

4. This objection was not taken on the trial; had it been,

it could have been obviated by a release from Mr. Olcott, and cannot therefore be urged here. (W. 142, 143; W. 562, 563.)

5. Jenkins was under no liability to the sheriff, except what arose from the bond. He was never confined to the four walls of the prison, and if he had given no bond for the limits, his escape from the limits would have been a voluntary escape, for which the sheriff would have had no remedy against him.

6. But if this were otherwise, the release was executed to render Jenkins disinterested and competent, as a witness in behalf of the releasor. This would preclude him from afterwards claiming or enforcing against Jenkins any liability which would have rendered him incompetent as a witness.

7. This objection was not taken at the circuit; had it been, it could have been obviated by a further release from the sheriff, and will not therefore be listened to now.

Second. All the other decisions of the circuit judge, in relation to the admission of evidence, were correct, provided his charge to the jury was correct.

Third. The circuit judge committed no error in his charge to the jury.

1. A plaintiff cannot maintain an action for an escape procured by himself, or by his own fraudulent devices. (*Van Wormer v. Van Vorst*, 10 *Wend.* 356.)

2. The same consequences necessarily follow, if the escape be procured by the fraudulent contrivances and devices of the agent of the plaintiff.

3. The fraud of an agent is imputable to the principal, although committed without his authority, knowledge or assent. (*Story on Agency*, § 452; *Per PARK, B., in Cornfoot v. Fowke*, 6 *M. & W.* 373; 1 *Salk.* 289; 2 *H.* 461; *Story on Agency*, § 140; 23 *W.* 260.)

This principle extends to sub-agents employed by the immediate agent of the principal. (*Id.* § 554.)

The jury in this case, have found that the escape, for which the plaintiffs seek to charge the sheriff, was procured by the fraudulent device and contrivance of Baker, acting in concert

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with Mink,—Baker being the agent of Hadley, (the plaintiff in interest,)—for the purpose of commencing a suit to charge the sheriff with this debt, if Jenkins should escape from the limits ; and that this fraud was resorted to by Baker, to enable him successfully to do the very thing which he was authorized by Hadley to do, to wit, to commence a suit against the sheriff for the escape, and thus charge him with this debt.

If Baker, at the time of concocting and carrying into effect this fraudulent scheme to enable Hadley to charge the sheriff with this debt, had not been the agent of Hadley for any purpose, Hadley could not avail himself of *the fruits of this fraud*, concocted and executed for his sole benefit, without subjecting himself to all the consequences of such fraud. He cannot adopt the escape, which was procured solely for his benefit, and repudiate the means by which it was procured ; he must adopt all or none of the unauthorized acts of the person acting as his agent, and for his benefit. *Smith's Commercial Law*, 114, 115, 3d ed., by *Holcombe & Gholson.*)

The attempt to reap the benefit arising from such fraudulent act, is an adoption of the act itself ; and renders Hadley responsible for all its consequences, as much as though it had been done by his previous command. (*Story on Agency*, § 455.)



Fourth. His honor, the circuit judge, committed no error in refusing to charge as requested by the plaintiffs' counsel.

1. The first and second requests (*pp.* 33, 34,) are simply the converse of what the judge did charge.

2. The third proposition required the judge to decide a question of fact. He committed no error in refusing to comply with such request, but properly submitted it to the jury.

3. The fourth request was properly refused by the judge. There was no evidence to justify the instruction required.

4. The fifth and last request, is merely the converse of the principle answered in the charge which had been given.

 *N. Hill, jr.*, same side. 

DECISION.—*Judgment affirmed, unanimously—with defendant's taxed costs, and one-half thereof in addition.*

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NOTE.—The supreme court, BEARDSLEY, J., *held*, that there was no error in allowing Jenkins to be sworn and examined as a witness for the defendant. The objection that the witness, notwithstanding his release by defendant, still remained liable to Olcott, his bail, was not made on the trial; and could not be regarded in that court.

Assuming that Jenkins, independently of his bond for the limits, would have been liable to indemnify the defendant for an escape, such liability was merged in the higher security—the bond; and did not exist when the release was executed. But this point was not intended to be decided, nor was it made on the trial. If the plaintiffs intended to insist that the release was defective in form or in the manner of execution, they were bound to make the objection in a specific form. A general objection, such as was made, ought not to be regarded.

Second. Baker was the agent of Hadley to commence an action against the sheriff, if Jenkins should be seen off the limits. This was the character and extent of his agency. If the escape was brought about by him and Mink, who were acting to aid Hadley and for his supposed benefit; and the latter sought to gain an advantage by the result of such labors in his behalf, he necessarily thereby became a party to what they had done,

One who endeavors to turn to his own advantage what others had assumed to do for his benefit, although without authority, is, as to such act, deemed to stand in their place; and if what the assumed agents had done was fraudulent as to themselves, it was equally so as to him who thus adopts and assumes it.

In this case, therefore, there was no escape from the limits, for which Hadley could have redress. In effect, he procured it; and therefore the action would not lie.

Third. The charge of the circuit judge was correct, in stating, that it was not enough to show that Jenkins was in doubt as to the boundary of the limits; and that, if he was induced to go beyond them by the trick and fraud of the agent of the owner of the judgment, acting with a view thereby to aid such owner in collecting the amount of the sheriff; the action could not be maintained, although a doubt might have been entertained by Jenkins, as to the place of the boundary of the jail liberties.

Not reported.

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DODGE, appellant, *agt.* MANNING and others, respondents.

Questions discussed.

1. Whether the legacy claimed by the appellant, and mentioned in the will of John I. Becker, deceased, was an equitable charge and lien primarily on the lands of the respondents, as purchasers claiming title under the will?

2. Whether the real estate, under a mortgage foreclosure, was purchased *subject* to the payment of the legacies, notice thereof having been given at the sale—and, therefore, should be charged in exoneration of the personal estate?

3. Whether it was necessary for the appellant, the complainant, to aver in the bill, and prove an insufficiency of personal property to pay the legacies; and if such averment was necessary, whether the defendants should not have demurred?

4. Whether a *mortgagee* has *constructive notice* that legacies are a charge on the premises mortgaged by the devisee, being obliged to make title through the will of the testator?

5. Whether, although the devisee, one of the defendants, by accepting the devise, was personally liable for the complainant's legacy, the lands were nevertheless charged, and under the circumstances, of the equities between the defendants, were first liable?

6. Whether there was any personal estate in the hands of the devisee applicable to the payment of legacies? And whether the answers aver any?

7. Whether the legacy of the complainant had been paid?

JOHN I. Becker, of Middleburgh, county of Schoharie, and state of New-York, on the 14th of April, 1804, made and published his last will and testament, as follows:

In the name of God, amen, I, John I. Becker, of Middleburgh, county of Schoharie, and state of New-York, being weak in body, but of sound and perfect mind and memory, blessed be the Almighty God for the same; do, this fourteenth day of April, in the year of our Lord, one thousand eight hundred and four, make and publish this my last will and testament, hereby revoking and disannulling all former wills by me made, and allow this only as and for my last will and testament, in manner and form following, that is to say:

First. I will that all my just debts be paid.

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Secondly. I recommend my soul to God who gave it to me, and my body to the earth, to be buried in a christian-like, decent manner, at the discretion of my executors hereinafter named.

Item. I give and bequeath unto my daughter Caty, wife of Michael Borst, a certain piece or parcel of land, pasture and wood land, lying and being in the town of Middleburgh, between the lands now in possession of John S. Becker, and the lands of the heirs of my brother, David Becker, deceased; said lands is part of lot number fifty-six, containing twenty acres, be the same more or less, according to a deed executed to me by my father, John H. Becker, deceased, in his lifetime.

Item. I give and bequeath unto my beloved wife, Cornelia, all the remainder of my estate, both real and personal, of whatsoever name or nature the same may be, during her natural life; and after her death, it is my will, and I give and bequeath unto my grandson, John Becker Borst, son of my daughter Caty, all the property heretofore given unto my wife, that is to say, *if* he should be of age, if not, it is my will that my daughter Caty, heretofore mentioned, shall have the same until he, the said John Becker Borst, shall arrive to the age of twenty-one years, and then to be his, his heirs and assigns forever.

Item. Its also my will, that if said grandson, John Becker Borst, should die before he arrives to the age of twenty-one years, or die without issue, that all the estate heretofore given to him, shall belong to my grandson, Peter, and brother of the said John Becker Borst, and to his heirs or assigns forever.

Item. It is my will, and I give and bequeath unto my granddaughter, Cornelia, daughter of my daughter Caty, the sum of two hundred and fifty dollars, to be paid out of my estate by my grandson, John Becker Borst, one year after he shall arrive to the age of twenty-one years, and to her respective heirs and assigns forever.

Item. It is my will, that my said grandson, John Becker Borst, pay unto my grand-daughter, Catharine, and sister of

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his, the like sum of two hundred and fifty dollars, two years after he shall arrive of age, and to her heirs and assigns forever.

Item. It is also my will, that my grandson, Peter Borst, shall have the sum of two hundred and fifty dollars, out of my estate, to be paid by my grandson, John Becker Borst, and to his heirs and assigns forever.

Item. It is also my will, that my grandson, John Becker Borst, pay unto his brother, William Borst, the like sum of two hundred and fifty dollars, four years after he shall arrive at age, and to his heirs and assigns forever.

Item. It is further my will, that if my grandson, John Becker Borst, should die as heretofore mentioned, and the estate fall into the hands of Peter Borst, as is mentioned, that in such case, he shall pay unto the legacies as John Becker Borst was to do.

Item. It is also my will, and I give unto my daughter Caty, if she should need the same, or be in suffering condition, a sufficient support during her life, out of my estate heretofore given to my grandson John.

It is also my will, and I order that if the said John Becker Borst and Peter Borst, my grand-children, should both die without heirs, that my estate heretofore given them, shall be divided between my other grand-children, share and share alike, or their heirs.

Lastly. I do hereby nominate, constitute and appoint my beloved wife, Cornelia, and my son-in-law, Michael Borst, together with my trusty friend, Peter Swart, junior, my sole executors of this, my last will and testament, hereby revoking all former wills by me made, and allow this only as and for my last will.

In witness whereof, I have hereunto set my hand and seal.

JOHN I. BECKER, [L. s.]

Signed, sealed, published and delivered
by the above named John I. Becker,
to be his last will and testament, in the

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presence of us, who have hereunto subscribed our names as witnesses in the testator's presence.

BARENT BECKER,
her

REBECCA X BOWMAN,
mark.

STORM A. BECKER.

In February, 1835, Cornelia Dodge, one of the legatees under the will, filed her bill in chancery against Ralph Manning, Alexander Boyd, Harmanus Becker and John B. Borst, for the payment of her legacy.

The bill stated, that John I. Becker, in his life time, was seized in fee of divers messuages, lands, and tenements, of the value of \$10,000; that he died in January, 1805, leaving his wife, Cornelia, and all the said legatees and devisees, him surviving. That Cornelia, the widow, died in February, 1832. That on the 8th of September, 1826, John Becker Borst and Marion, his wife, and Peter Borst, executed a mortgage to one George Maxwell, covering all the said real estate so devised to John Becker Borst, to secure the payment of \$6,000 and interest. That on the 2d of July, 1834, all the said lands and tenements so mortgaged, were sold by and under a decree of foreclosure of said mortgage; and that said premises were sold by parcels, subject to the payment of all the above mentioned legacies. And that said defendants respectively became purchasers of a parcel of said mortgaged premises, subject to the payment of said legacies. That said purchasers had taken possession of their respective parcels of said premises. That complainant, by virtue of said will, was entitled to said legacy of \$250, and interest for the same, to be computed from the 15th of September, 1821, being the expiration of one year from the time that the said John Becker Borst arrived to the age of twenty-one years. That she had, at several times, demanded payment of said legacy of said defendants, which they refused to pay; and praying that said defendants, or such of

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them as ought to do so, might be decreed to pay said complainant's legacy, and the interest due as aforesaid, together with her costs and charges. And, that if necessary, that said premises, so charged with the payment of said legacies, or so much thereof as might be necessary, might be sold for the payment of said complainant's legacy.

The joint and several answer of Ralph Manning, Harmanus Becker, and Alexander Boyd, admitted that said John I. Becker, at the time of his death, was seized of the lands and tenements mentioned in the bill; but that they did not exceed in value the sum of \$7,000. Admitted the making and execution of the will; and that he gave thereby to complainant \$250, to be paid out of his estate, by his grandson, John Becker Borst, one year after said John Becker Borst should arrive at the age of twenty-one years. Also, admitted that the testator gave, by his will, the other legacies to said several legatees as mentioned in the bill. Defendants denied that the legacies to Catharine Borst and William Borst were to be paid out of his estate. Admitted the death of the testator and his widow, as mentioned in the bill. Admitted the execution of the mortgage to Maxwell, as stated in the bill; and the foreclosure thereof, and sale in parcels to the defendants, as stated in the bill. But denied that said parcels were, or either of them was sold, subject to the payment of said legacies, or any, or either of them, or any part thereof. Had no knowledge or information, except from the bill, and what was thereafter stated in the answer, whether or not said parcels so purchased by said John B. Borst, was sold or purchased by him; subject to the payment of said legacies, or any, or either of them. But alleged that said John B. Borst, having accepted the devise and bequest so made to him by the testator, became personally liable for the payment of said legacies; and, if not paid, said legacies were an equitable lien upon so much of the said premises as might be owned, or have been purchased by said John B. Borst, and that the testator not having by his will made the legacies a charge upon said real estate, or any part thereof, so devised to said John B. Borst. And that said

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parcels, so purchased by the defendants, not having been purchased subject to the payment of the said legacies, were not subject to or liable for their payment. Denied that they were liable for the payment of said legacy, or any part thereof; or that the parcels of land so purchased by defendants, were subject to its payment.

Ralph Manning, one of the defendants, admitted a demand made by complainant, for payment of said legacy; that he replied thereto, that he did not suppose that he was bound to pay it, but if he was bound, he would pay it.

All the defendants denied any other demand of payment of said legacy.

Defendants stated, that at or about the time of the sale of said mortgaged premises, and immediately previous thereto, the defendant John B. Borst, who was present, stated to the persons there present, and within the hearing of the defendants, but not to the defendants, or either of them particularly, that there were certain legacies that must be paid out of the said mortgaged premises. And that Peter I. Borst, who was also present at said sale, stated in like manner, at or about the same time, that there was a legacy coming to him which was to be paid out of the said mortgaged premises. Defendants alleged that it was stated, in reply to the said statements of John B. Borst and Peter I. Borst, as above set forth, by Marcus T. Reynolds, Esq., who, as defendants were informed and believed, attended said sale on behalf and as counsel for said George Maxwell, that said legacies were not a charge upon, or to be paid out of the said mortgaged premises, or to that import.

Alleged that said mortgaged premises were sold by the said master, and purchased by defendants respectively, free, clear, unincumbered and discharged from said legacies, or any, or either of them, or any part thereof; and that the deeds executed by the master to the defendants respectively, were for the absolute sale and conveyance of said respective parcels, and not subject to said legacies or to the payment thereof, as by reference to said deeds would fully appear. That the de-

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cree under which said premises were sold, ordered and decreed the absolute sale thereof—not subject to the payment of said legacies, or any, or either of them, or any part thereof; and that the power of sale contained in said mortgage, authorized and empowered the said mortgagee to sell said premises absolutely.

Defendants alleged that said legacy to complainant had been paid and satisfied by said John B. Borst, to said complainant, or to her husband, Daniel D. Dodge, in his life time.

Defendants further answered, that they were informed and believed, and expected to be able to prove, that the said testator, John I. Becker, at the time of his death, was possessed of a large amount of personal property, consisting of horses, cattle, sheep, swine, implements of husbandry, household furniture, negro slaves and wearing apparel, amounting in value, as appeared by an inventory thereof, made and signed by Joseph Borst, jr., and Barent Vrooman, then deceased, appraisers, on the 20th of August, 1805, to \$1,326.50.

John Becker Borst, the other defendant, put in an answer admitting the facts charged in the bill.

Depositions were taken—and the complainant introduced as the first witness, *Cyrus Smith*, as follows :

On the second day of November, in the year of our Lord one thousand eight hundred and thirty-six, at the hotel kept by Cornelia Dodge, in the town of Middleburgh, county of Schoharie, before me, John C. Wright, an examiner in chancery for the county of Schoharie, appeared *Cyrus Smith*, a witness produced by the complainant in this cause, who, being by me duly sworn, says,—that he is thirty-six years of age, and resides in the town and county of Schoharie, and that he is under-sheriff of the county of Schoharie. On being interrogated by the counsel for the complainant, whether he was present when a sale was pretended to be made, under a mortgage executed by John B. Borst and wife, and Peter M. Borst to George Maxwell, in the summer of the year 1834; the counsel for the defendants objects to the question; and I decide that the same may be put, subject to the objection. The

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witness, in answer to said question, says, that after Mr. Gibson had put up the property for sale, and had given the boundaries of the several pieces of land to be sold, Mr. Peter I. Borst notified those present, that there was a claim under a will, and that those who purchased would have to pay it to Mrs. Dodge, Mrs. Borst and William Borst. Witness is now certain that Mr. Peter I. Borst said they were legacies which were due, and that the legacies were due under the will of one John Becker, in whose name there is a middle letter, thinks it is B, but cannot state certainly. The amount of the legacies was stated at the time; and witness thinks that two hundred and fifty dollars to each, was the amount, but he will not state certainly; thinks that Mr. Borst also stated that interest was claimed on the legacies. The defendants, Ralph Manning, Harmanus Becker, Alexander Boyd and John B. Borst, were present at this time. At the time of the sale, a Mr. David Shafer, who was present, inquired of Mr. M. T. Reynolds, who was present, as the solicitor for the complainant, (Maxwell,) whether he would indemnify against the payment of the legacies chargeable on the premises; that Mr. Reynolds replied, that he would not indemnify, but he did not believe it would cost as much to indemnify, as he had been offered to plead a bastardy cause on his way up from Albany. The witness further states, that Mr. David Shafer bid upon the property which was then about to be sold, and ceased to bid about the time that Mr. Reynolds said he would not indemnify, and that Shafer said that he would not bid higher for the farm than what he had bid, and run the risk of the legacies. Witness is not certain, whether Shafer bid after the statement made by Mr. Reynolds; that Shafer had bid to a considerable amount, and nearly to the amount at which it was sold. The Mrs. Borst spoken of, as entitled to a legacy, was the wife of Peter I. Borst.

CYRUS SMITH.

On being *cross-examined* by the counsel for the defendants, the witness further states, that he understood, from what Mr.

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Reynolds said at the sale, that he, Mr. Reynolds, did not consider the legacies as a charge ; he spoke very lightly of them.

CYRUS SMITH.

On being further *re-examined* by the counsel for the complainant, the witness further states, that Mr. Reynolds said he would not indemnify against the legacies ; that he treated them lightly.

CYRUS SMITH.

Subscribed and sworn, this second day }
of November, 1836, before }

J. C. WRIGHT,

Examiner in Chancery.

The complainant thereupon introduced, as witnesses, *Peter M. Borst, Peter Swart, jr., Joseph I. Borst, Freeman Stanton, William I. Borst, Jacob Becker* and *Alexander Borst*, who respectively were present at the sale, and corroborated the testimony of Cyrus Smith, in reference to the notice given of the legacies, by Peter I. Borst, and as to what M. T. Reynolds, Esq., replied in answer to the question, whether he would indemnify against the legacies, &c. Joseph I. Borst stated, that he was deterred from bidding upon the premises, in consequence of the legacies. Alexander Borst stated, that some time after the sale, he went with Mrs. Dodge, the complainant, to Mr. Manning, one of the defendants, and she demanded of Manning payment of her legacy ; that Mr. Manning refused to pay, and said it would have to be tried or contested. The complainant produced exhibit A., which was a certified copy of the bill filed by George Maxwell, for the foreclosure of his mortgage on said premises ; and exhibit B., a copy of the will of John I. Becker, with letters testamentary thereon.

The defendants, Manning, Becker and Boyd, introduced testimony, and *Samuel B. Wells* was first called as a witness, as follows :

On the third day of November, one thousand eight hundred

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and thirty-six, at the hotel kept by Cornelia Dodge, in the town of Middleburgh, county of Schoharie, before me, John C. Wright, examiner in chancery, appeared *Samuel B. Wells*, a witness produced by the defendants, Ralph Manning, Harmanus Becker and Alexander Boyd, who, being by me duly sworn, testifies and says,—that he is forty years of age, that he resides in the town of Middleburgh, and is by profession a physician ; that he was present two years ago, just before harvest, at a sale made by Alexander C. Gibson, of premises belonging to John B. Borst. The master gave notice that the sale would take place. Mr. Peter I. Borst then rose, and gave notice that the estate was charged with some legacies, and that the purchasers must expect to pay those legacies ; some conversation then took place between said Borst and Mr. Reynolds, in relation to the legacies ; Mr. Reynolds remarked, that he did not consider the estate as charged with the legacies ; and that he was offered five dollars for pleading a bastardy suit on his way from Albany, and that he would not give that for all the legacies. Witness was present during the whole sale ; witness does not recollect anything further that was said ; if Reynolds, at the sale, had said audibly that the premises were sold subject to the legacies, witness thinks he would have heard it.

SAMUEL B. WELLS.

And the said *Samuel B. Wells*, on being *cross-examined* by the counsel for the complainant, further testifies, and says,—that he does not recollect, distinctly, all the conversation that took place at the sale between Mr. Reynolds and others. At the time Mr. Peter I. Borst gave notice of the legacies, it produced some excitement, and two or three persons were talking at a time ; and witness does not recollect all that was said ; thinks that Peter I. Borst said that some of the girls and his wife were entitled to the legacies ; whether he mentioned any other name, witness cannot say ; that his (Borst's) wife was one of the girls who were entitled to the legacies ; does not

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recollect that anything was said as to the amount of the legacies.

SAMUEL B. WELLS.

Subscribed and sworn, this third day }
of November, 1836, before me, }

J. C. WRIGHT,

Examiner in Chancery.

The defendants thereupon introduced, as witnesses, *William Holton, Elisha Durham, James Henry, Hezekiah Manning, Merriman Preston, Henry Hamilton* and *Alexander C. Gibson*. The witnesses, *Holton, Durham* and *Gibson*, corroborated the testimony of *Samuel Wells*, in reference to the proceedings at the sale. *Gibson* was the master who made the sale, and he stated that there was considerable conversation between the parties about the legacies at the time of the sale, which were alleged on the one side to be chargeable on the land, and denied on the other; that the property was sold absolutely, as he understood. There was no reservation in the written terms of the sale, produced by witness, as master; and no reservation in the deed executed by him. The persons who spoke of the legacies were not, as witness thought, parties to the suit, but persons present who appeared to have some interest in the sale. The counsel for complainant objected to the above evidence, in relation to the writing called "terms of sale," and the deed given by witness. Evidence allowed, and questions reserved for the opinion of the court.

The witness, *Manning*, stated that, in the lifetime of Daniel D. Dodge, the husband of the complainant, and two or three years before his death, witness had a conversation with him; Dodge wanted to sell witness his interest in a twenty acre lot—an interest he claimed in right of his wife—and of which lot witness had taken a lease; witness said that he did not want the interest of Dodge in that lot, unless he could get the whole; witness stated to Dodge, that he had better sell his interest to John B. Borst, as he had understood that Borst had bought out most of the heirs. Dodge stated that he did not

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wish anything to do with John, as he had settled off with him. Something was said by witness to Dodge, in relation to the demand due from John to him, Dodge. Dodge replied, that he had settled all his demands with John, and did not wish anything to do with him. Witness had reference, in the conversation with Dodge, to the legacy due to his (Dodge's) wife, and believed he so expressed himself; that Dodge understood him as referring to that demand. Witness lived near to Dodge at that time, and at the time of his death; witness had lived near Dodge for about fifteen years previous to his death. Witness, in answer to a question, stated that Dodge and John B. Borst had difficulty, but for what length of time, witness could not say. It was considered that they were not on very friendly terms. Did not know what Dodge's circumstances were, but understood he was in debt; he built a house, two story building, which he occupied, previous to his death, as a tavern, and was then occupied by his widow, the complainant.

The witness, *Merriman Preston*, stated that he understood that Dodge was in debt; thought he had not a great amount of property in his hands. Dodge and John B. Borst, while witness knew them (some fifteen years) lived neighbors to each other; they were not on very good terms some part of the time. Dodge had been building previous to his death.

The witness, *James Henry*, stated that William M. Borst, brother of complainant and John B. Borst, and one of the legatees, had more than once told witness that John B. Borst had paid, and more than paid the amount of the legacy to him, and that he, William, was still owing his brother John.

The said defendants then produced exhibit A—an exemplification of the mortgage given by John B. Borst and wife, and Peter I. Borst to George Maxwell, Exhibit B.—a copy of a notice, given by defendants solicitor, of the examination of witnesses. Exhibit C.—copy of an inventory of the goods and chattels of John I. Becker, deceased, made up to the 20th of August, 1805, amounting to \$1,326.50.

The cause was heard on pleadings and proofs, before Hon. JOHN D. WILLARD, vice-chancellor of the fourth circuit, who,

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on the 24th of October, 1838, after an elaborate opinion, decided, that the legacy was a lien on the realty, and that the defendants, Manning, Becker and Boyd, knew that the complainant had this claim at the time they purchased. It was publicly announced in such a manner, and by such a person, as lead to inquiry. They made inquiry of Mr. Reynolds, and he refused to indemnify them. It is true, he spoke lightly of the claim. But, it shows they knew of the claim, and of course bought at their peril. Other bidders were deterred from bidding. It is presumed, the amount of the legacies was considered in the purchase. It was not necessary for the master to announce it, nor to have referred to the legacies in the deed given by him. The proof is most full and satisfactory, that the legacy of the complainant was known by the purchasers at the sale. They must, of course, bear the expense of it, in proportion to their respective purchases. There must be a reference to a master to compute the amount due on the legacy, computing interest from one year after John B. Borst became of the age of twenty-one years; and to ascertain the amount of the purchase of each defendant, under the mortgage foreclosed in the pleadings mentioned, and to apportion the amount of said legacy among the said defendants, according to their respective bids on said sale, and on the coming in and confirmation of the said report, the complainant have execution, &c.

On the 6th of September, 1845, the CHANCELLOR dismissed the bill of the complainant, as to the defendants, Manning, Becker and Boyd, with costs; and decreed that the complainant recover against the defendant, John B. Borst, the amount of the legacy, with interest, from the 15th September, 1821, and also her costs.

It was further decreed that said legacy was made, by said will, a specific charge and lien on the premises devised therein to the defendant, John B. Borst, and that the same, together with the costs of the complainant, remained a charge and lien on that part of said premises, devised to said John B. Borst, which were purchased by said Borst at the master's sale.

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The complainant appealed from the decree of the chancellor.

Platt Potter, attorney, and
N. Hill, jr., counsel, for appellants.

First. The complainant's legacy is an equitable charge on the lands devised to John B. Borst, and the charge binds and is a lien on the lands in the hands of the defendants.

The testator gave and bequeathed all the remainder of his estate, both real and personal, to his wife during life, and after her death, he gave and bequeathed the same to his grandson, John B. Borst, in fee; he then gave the complainant a legacy of \$250, "to be paid out of (my) his estate, by John B. Borst, one year after he (shall) should arrive at 21." (*Harris v. Fly*, 7 *Paige*, 421; *Alcock v. Sparhawk*, 2 *Vernon's Ch. R.* 228; *Cloudsly v. Pletham*, 1 *Vernon's Ch.* 386, *yr.* 1686; *Aubrey v. Middleton*, 2 *Eq. Case Ab.* 497, *case* 16; *Elliot v. Hancock*, 2 *Vernon's Ch.* 143, *yr.* 1690; *Syphet v. Carter*, 1 *Ves. Sen.* 499; *Hassell v. Hassell*, 2 *Dickens' Ch. R.* 527, *yr.* 1776; 2 *Story's Eq.* 493, 494, §§ 1246, 1247, and *note* 2, to *p.* 494; *Glen v. Fisher*, 6 *John. Ch.* 38.)



Birdsall v. Hewlett, (1 *Paige*, 32.) Legacies are an equitable charge on the land, although the devisee, by accepting the devise, becomes personally liable. (1 *Paige*, 408; 1 *Roper on Leg.* 452; *Henville v. Whitaker*, 3 *Russ.* 343; *Dover v. Gregory*, 10 *Simon*, 393; *Graves v. Graves*, 8 *Simon*, 54; *Kelsey v. Deyo*, 3 *Cow.* 141.)

The estate for life of the widow, in the real and personal estate, was exempt from the charge of the legacies. The personal, as well as the real estate for life, was exonerated; this was the intent of the testator.

Real estate may be generally charged with debts and legacies, with exception of a particular interest, limited in the whole or part of the estate, where the intention of the testator is clear in favor of such exemption. (1 *Roper on Leg.* 453; *Birmingham v. Kerwan*, 2 *Scho. & Lef.* 444, 448; *Pr. Ld. REDESDALE.*)

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Where the real estate is combined with the personal, and both are made to constitute one fund, the former will be liable to all the burdens of the latter. (*Bench v. Biles*, 4 *Mad. Ch.* 187 ; 1 *Roper on Leg.* 450 ; *Kidney v. Coussmaker*, 1 *Ves. Jr.* 436 ; 2 *Ves. Jr.* 257 ; *Carey v. Carey*, 2 *Scho. & Lef.* 188 ; 1 *Roper on Leg.* 452 ; *Webb v. Webb*, *Barnard R.* 86 ; *Harris v. Fly*, 7 *Paige*, 421 ; 1 *Roper on Legacies*, 452, 343, 450 ; 2 *P. Wms.* 188.)

 Reason why pecuniary charge on personal estate, because common law favors *heir*—and so of devisee. 

Second. The legacies must be paid out of the real estate, in exoneration of the personal, (if any,) as the former was purchased subject to the payment of the legacies, (notice having been given at the sale,) and at a diminished price in consequence thereof.

Third. And as John B. Borst united in the notice at the sale, the real estate is now the primary fund for the payment of the legacies, and the personal estate is exonerated and discharged. (1 *Roper on Leg.* 463 ; 1 *Roper on Leg.* 466, 470 ; *Samuel v. Wake*, 1 *Bro. C. C.* 144 ; *Hartley v. Hurle*, 5 *Ves.* 540 ; *Merv.* 236 ; *Greene v. Greene*, 4 *Mad. Ch.* 148 ; *Burton v. Knowlton*, 3 *Ves.* 107, 109 ; 1 *Roper on Leg.* 474, 484 ; 1 *Bro. C. C.* 462 ; 4 *Ves.* 823 ; 9 *Ves.* 454 ; 1 *Merv.* 219, 220 ; 7 *Paige*, 421 ; 2 *John. Ch.* 614 ; 3 *Mad.* 56 ; *Eber v. Fisher*, 6 *J. Ch.* 33.)

As between the complainant and these defendants, the ordinary questions, which is the primary fund, and which the secondary fund for the payment of these legacies, or which fund is to be first applied in payment ; and which, if either, is auxiliary to the other, do not arise in this case.

If there had been any personal fund, which came to the hands of the devisee, applicable to the payment of these legacies, as between certain parties, viz. : a *bona fide* purchaser of the real estate without notice, and John B. Borst, or his personal representatives, or perhaps the legatee, or as between the heirs at law and personal representatives of John B. Borst ;

these questions might have arisen, and in such cases no doubt the personal estate must have been first applied.

But here, if the personal estate formed any part of the charged, blended fund, (real and personal,) the blended fund belonged to John B. Borst, and he chose (he had a right to do so,) to cast the whole burden on the real estate, (one part of the fund.)

At the sale, Borst was present when the notice was given; and at one time gave the notice himself, (*answer, fol. 56,*) that the legacies were a charge on the real estate, and he assented to the notice of Peter I. Borst, that they were to be paid out of the real estate. The defendants purchased with this notice. They, therefore, purchased subject to the payment of these legacies, as clearly as if they had taken a conveyance, expressing, on its face, that it was subject to them.

The owner of real and personal estates may stamp on them what nature he pleases. As where a man purchases land subject to a mortgage, he may, or he may not, as he pleases, adopt the mortgage debt as his own, so as to subject his personal assets to the burden of discharging it in exoneration of his real estate. (1 *Roper on Leg.* 495, 489.)

Fourth. There was no personal estate in the hands of John B. Borst, applicable to the payment of the legacies. The answer avers none. It avers, merely, that John I. Becker was, at the time of his death, possessed of personal property, consisting of horses, cattle, sheep, swine, implements of husbandry, household furniture, negro slaves and wearing apparel. The answer (*fol. 63,*) does not aver, that any of this property remained at the death of the widow. She had a life estate in it, which was exempt from the charge. The inventory of the testator's personal property is proved. From that, it will be seen that there could have been no personal estate, of any value, at the death of the widow. The slaves became free in 1824 or 1825. The horses, cattle, sheep and swine, were worn out and dead. The increase did not go to the remainder-man. The implements of husbandry, after a use of 27 years, must have been worn out and valueless. Same as to the household

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furniture and wearing apparel. And out of this property, the funeral expenses and debts were to be paid. The proofs, therefore, show a deficiency of personal estate to pay the legacies.

The allegation in the answer is insufficient, as to personal estate. It should have averred, and the defendants should have proved, that personal property came to possession of John B. Borst. It was not necessary to aver in the bill an insufficiency of personal property. If such averment was necessary, the defendants should have demurred. Again, the answer does not aver that the testator died possessed of personal estate sufficient for the payment of his debts, or that any remained after the payment of the debts, to be applied to the payment of these legacies.

Fifth. It was not necessary to give Maxwell notice of the charge. He was only a mortgagee. His mortgage was merely a specific lien—a security for a debt. The property mortgaged was subject to the legacies. It was an adequate security for Maxwell's debt. But he had constructive notice that the legacies were a charge, being compelled to make title through the will of John I. Becker; and the defendants had both actual and constructive notice of such charge. A purchaser deriving title through a will, and thereby having constructive notice of its contents, takes the estate devised subject to the equitable claims of legatees, where the legacies are by the will charged on such estate. (*Harris v. Fly*, 7 *Paige*, 427.)

The defendants, however, have not set up, in their answer, that Maxwell was a *bona fide* mortgagee, without notice of the equitable claims of the legatees. This was necessary to protect themselves as *bona fide* purchasers. (*Harris v. Fly*, 7 *Paige*, 421.)

Sixth. Although the defendant, John B. Borst, by accepting the devise, is personally liable to complainant, the lands are nevertheless charged, and the complainant can, and, under the circumstances, is obliged to resort to them first for payment. The equities, as between J. B. Borst and the defend-

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ants, require that the lands should be first resorted to. (*See authorities before cited.*)

Seventh. The defendants, having had notice of the legacy, are liable to the payment of the legacy, with interest and costs. Refusing to pay when called on, subjects them to costs. (*Fol. 50 to 53, and fol. 120 to 123.*) And such costs are a charge on the real estate. (1 *Paige*, 32, 407.) Interest is payable on a legacy from the time it is due; and where the legacy is a charge on real estate, the interest is a charge also. The answer (*fol. 47,*) admits that the legacy, (if not paid,) and interest thereon, from the end of one year after J. B. Borst came of age, is due to the complainant. Interest on a legacy is payable, although not demanded. Costs also are recoverable, although there has been no demand. (*Glen v. Fisher*, 6 *John. Ch.* 38; *Freeman v. Simpson*, 6 *Simon*, 75.)

Eighth. There is no evidence of the payment of the complainant's legacy.

1. H. Manning is the only witness on the subject of payment. (*Fol. 206 to 212.*) He swears only to the declarations of the complainant's husband. These, if admissible in evidence, do not make out payment. The whole evidence consists of declarations of Dodge, "that he had settled off with John B. Borst." The legacy of complainant was not mentioned during the conversation. (*Fol. 212.*) It was, therefore, only the inference of the witness, that Dodge referred to the legacy. This conversation was two or three years before Dodge's death. (*Fol. 207.*) Dodge died four or five years previous to November 30, 1836. (*Fol. 213.*) The conversation must, therefore, have been previous to the death of testator's widow. She died 15th of February, 1832. (*Fol. 41.*) And it was before the time the parties had reason to suppose, and probably did suppose, that the legacy was to be paid; which was at the death of the widow; as John B. Borst was to pay it out of the estate. And he could not well pay it out of the estate before he came into the possession of such estate. There is, therefore, no reason to suppose that Dodge, in the

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settlement to which he alluded, referred to the legacy due the complainant.

This legacy Dodge could not have received, if the complainant objected, without making a provision for her. (5 *John. Ch.* 196; 7 *Paige*, 633; 4 *Paige*, 64; 2 *Kent Com.* 139; 2 *Story Eq. Juris.* § 1414; 6 *Paige*, 366; 6 *John. Ch.* 25; 5 *John. Ch.* 464.)

It is improbable that John B. Borst should pay this legacy, before he received the property out of which it was to be paid. And, it is improbable that Dodge should have claimed it before that time. Dodge had no right to collect it without his wife's consent. He could not have maintained an action at law for it; the legacy being a charge on both real and personal property. (6 *Cow.* 333.) The admission, by John B. Borst, in his answer, that this legacy is still due, confirms the position that the legacy has never been paid.

2. But the declarations of Dodge are inadmissible in evidence against the complainant. They were objected to. (*Fol.* 207.)

Husband and wife cannot be witnesses for or against each other. (1 *Phil. Ev.* 77; 2 *Cow. & H. notes*, 1554.) A wife cannot, after her husband's death, disclose his conversations. (2 *Cow. & H. notes*, 1555; 7 *Vern. R.* 537; *Peake cases*, 219, 221.)

A widow cannot be asked to disclose conversations between herself and her late husband. (*Bolker v. Hasler*, 1 *Ryan and Moody*, 198; *per* BEST, C. J.) A woman, after a divorce, cannot testify to conversations with her husband, during the existence of the marriage. (*Munsal v. Twisleton*, *Peake Ev. App.* 44; *per* lord ALVANLEY.) So, where wife is a sole party, claiming in her own right, and under right paramount to her husband, his admission is not evidence against her, although made during coverture. (*Smith v. Scudder*, 11 *Ser. & Rawle*, 326.)

Evidence of declarations of a party, is to be scrutinized and received with caution. (*Law v. Merrils*, 6 *Wend.* 268; *per* CHANCELLOR.)

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3. The demand of the legacy, when the bill was filed, was not a stale demand. The bill was filed within three years after the death of the testator's widow. The answer sets up neither the staleness of the demand, nor the statute of limitations. There is no presumption of payment from lapse of time. (2 R. S. 301.) Neither lapse of time, nor the statute of limitations, would bar the complainant's right to recover her legacy; she having been a *feme covert* until November, 1831 or 1832. (Fol. 213; 1 Paige, 616.) There was no statute of limitations to a charge on real estate until 1830. (7 John. Ch. 115; 2 R. S. 302.)

Ninth. The quantity and value of the several portions of the land charged with the legacy owned by the defendants, and the amount of the personal estate (if any) applicable to the payment of the legacy, may be ascertained on a reference, and a proper decree made on the coming in of such report.

Tenth. Even if the personal estate (if any) is the primary fund for the payment of the complainant's legacy, the defendants, Manning, Boyd and Becker, as owners of portions of the real estate charged with the legacy, are proper and necessary parties, to the end that the real estate owned by them, may be resorted to for the payment of any deficiency which may remain after applying, in payment of the legacies, all the personal estate; which deficiency can be ascertained on a reference. When a bill is filed to recover a legacy charged on both personal and real estate, all the owners of both the personal and real estate should be made parties, in order that the different classes and portions of such estate may be resorted to for payment of the legacy in the order in which the same are by law charged. The bill should not, therefore, have, under any circumstances, been dismissed with costs.

11 Serg. & R. 326; 1 Greenl. Ev. § 200; 6 W. 277.
Reply—16 J. 201.

Woodruff & Young, attorneys, and

Wm. A. Young & M. T. Reynolds, counsel, for resp'ts.

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First. The legacies mentioned in the will of John I. Becker, deceased, if charged by him upon the real estate devised to John B. Borst, are so charged in aid of the testator's personal estate, which is first liable to pay them.

The general rule, as to the fund out of which legacies are to be paid, is well settled. (*Ward on Leg.*, vol. 18 of *Law Lib.*, p. 323, and cases there cited.)

(*Ram on Assets*, vol. 8 of *Law Lib.* pp. 58, 94.) A difference upon principle, between words charging lands with debts, and words necessary to create a charge of legacies, is recognised. (*Id.* p. 96, *et seq.*)

Under this point, see, further, *Lupton v. Lupton*, 2 *Johns. C. R.* 628 ; *Case*, fol. 272—*Opinion of the CHANCELLOR.*

The testator's personal property was appraised at \$1,326.50. (*Case*, fol. 244.)

At the time of his death, it does not appear that he owed any debts ; and no attempt has been made to show a decrease in the value of testator's personal estate.

The law by which a portion of the personal estate was set off to the widow and infant children, was passed in 1824. (*Sess. Laws*, 1824, p. 32, ch. 44.)

Second. The defendant, John B. Borst, having accepted the devise and bequest made to him by the testator, became liable, personally, for the payment of said legacies. And he having mortgaged the lands devised to him absolutely, and not subject to the legacies, the respondents ought not to be made liable to pay the legacies or any part thereof, so long as said John B. Borst is able to pay them.

See *Glen and Wife v. Fisher*, (6 *Johns. Ch. R.* 34, 35.) John B. Borst borrowed money of Maxwell, the mortgagee, upon the assurance that the lands were unincumbered. (*See case*, fol. 161.)

Besides, he admits all the allegations in the complainant's bill. (*See his answer*, *passim.*)

Third. The respondents, having purchased the premises in question under a foreclosure of the mortgage executed to George Maxwell, acquired the same rights that the mortgagee

would have acquired, (had he become the purchaser.) There is no proof that Maxwell, at the execution and delivery of the mortgage, had notice that the legacies were equitably charged upon the lands mortgaged to him ; and his rights could not be affected by notice subsequently given.

Maxwell was assured by John B. Borst, and Peter M. Borst, one of the legatees named in the will of John I. Becker, at the time the mortgage was given, that the lands were free of incumbrances, except the estate in dower of Mrs. Becker, in one parcel. Upon this assurance he was authorized to rely. (*See case, fols. 161, 162 ; appellant's exhibit A.*)

Fourth. The legacy bequeathed to the appellant, by the testator, John I. Becker, has been paid, either to the husband of the appellant, in his lifetime, or to the appellant herself, before the commencement of this suit.

The testator died in January, 1805. (*Fol. 40 of case.*) The legacy in question became payable in September, 1821. (*Fol. 25 of case.*)

Daniel D. Dodge, the husband of the appellant, died in 1833, or thereabouts. (*Fol. 95 of case, also, fols. 110, 213.*)

The appellant's husband, for some time previous to his death, was owing debts. He had been building a short time before his death. (*See case, fols. 210, 214, 204.*)

1. As a matter of presumption, the interest and convenience of the appellant's husband, would have induced him to collect the amount of the legacy bequeathed to his wife.

2. John B. Borst, for aught that appears to the contrary, ever since the legacy became due, has been able to pay the same. At all events, payment could have been compelled in chancery, out of his interest in the estate devised. (*See the Chancellor's opinion ; case, fol. 277.*)

3. There is evidence sufficient to prove payment of the amount of the legacy to the husband of the appellant, in his lifetime. (*Vide deposition of H. Manning. Case, fol. 207 to 212.*)

Besides, it is proved that the legacy bequeathed to William M. Borst, which became due subsequently to that given to the

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appellant, had been paid. (*Vide case, fol. 200 to 203, also, fol. 118.*)

So also of the legacy to Peter M. Borst. (*Vide complainant's exhibit A., fol. 161 of the case.*)



4. These presumptions, and the evidence referred to under this point, are confirmed by the answer of John B. Borst, and the circumstances under which it was put in.

His answer is without oath, though a sworn answer is called for in the bill. (*Compare fol. 27 of case with fol. 78.*)

It admits all the allegations in the bill, and was drawn under the direction of the appellant's solicitor. (*Vide case, fol. 217 to 221.*)

Fifth. The decree of the chancellor is not erroneous, and should be affirmed.

The decree provides for the payment of the appellant's legacy, by J. B. Borst. No appeal lies from the decree in respect to costs only. (*Rogers v. Holley, 18 Wend. 350.*)

 *M. T. Reynolds*, same side. (2 P. 122.) 

DECISION.—Ordered, adjudged and decreed, that so much of the decree of the court of chancery as dismisses the complainant's bill, as to the defendants, Ralph Manning, Harmanus Becker and Alexander Boyd, with costs to those defendants, be reversed and annulled. And it is further ordered, adjudged and decreed, that the complainant's legacy is a specific lien and charge on all the premises mentioned in the bill, as having been devised to John B. Borst, including the lands which were purchased by said Manning, Becker and Boyd, respectively, at the master's sale mentioned in the pleadings. And it is further ordered, adjudged and decreed, that after the complainant has exhausted her remedy against the said John B. Borst, under the decree made by the chancellor, if any deficiency shall remain of the debt and costs decreed to be paid by said Borst, the same is hereby declared to be a lien and charge on the lands purchased by the said Manning, Becker and Boyd respectively; and that the same be sold to satisfy the said charge.

For affirmance—JEWETT, Ch. J., and BRONSON, J. All the other judges for the above order.

Dodge *agt.* Manning and others.

NOTE.—GRAY, J., delivered the opinion of the court, and *held*, that no presumption of payment of the legacy could be derived from the lapse of time. Although the legacy became payable in one year after John B. Borst attained his majority, which was in 1820, yet the will directed it to be paid *out of the estate* given to him. And, by the provisions of the will, John B. Borst was not to have the estate, until the death of his grand-mother, the testator's widow, which did not occur until 1832. The legacy, therefore, did not become due until the latter period; and it was not pretended that the time which elapsed between that period and the filing of the bill, would warrant a presumption of payment.

The legacy, by the provisions of the will, became an equitable charge upon all the real estate devised to John B. Borst, of which that purchased by the respondents respectively, at the master's sale, was a part. But the devisee, by accepting the real and personal estate devised to him, became personally liable for the payment of the legacies. He was, therefore, primarily liable, and the remedy should first be exhausted against him, and the real and personal estate of the testator remaining in his hands, before the respondents should be charged in respect to the real estate purchased by them. If they purchased expressly subject to the payment of the legacy, that, of itself, might have made the estate in their hands directly and primarily chargeable. But the evidence did not justify the inference that they purchased in that manner. They merely had notice of the existence of the legacy.

Therefore, held, that the decree be made as above stated.

JEWETT, Ch. J., was of opinion that the decree of the chancellor should be affirmed, because, the complainant had failed to present, by her bill, such a case as would entitle her to a decree to enforce her lien, as against the devised premises in the hands of Manning, Becker and Boyd, in the event that she did not obtain satisfaction under a decree against Borst, and for the sale of that portion of the premises still remaining in his hands, on the ground that it did not appear but that the personal estate still remained in the hands of the executors, which might be reached and applied upon or in satisfaction of her demand.

If the bill showed that the personal estate had been exhausted in the course of administration, or that the persons who were accountable for it were not responsible, or that it had been accounted for and paid or delivered to Borst, or if the executors, in whose hands the same remained, were parties to this suit; in either case the complainant might have resorted to the lands of the respondents for payment of her legacy, or such portion as should remain unpaid, after exhausting her remedy against said John B. Borst.

Reported 1 Comstock, 298.

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A

ABATEMENT.

Questions.

1. Whether, by the death of the plaintiff pending an action of *replevin*, the action *abates*, and cannot be revived? *Burckle & Gebhard, Ex'rs.* agt. *Luce*, 330

2. Where property had been levied upon by a sheriff, by virtue of an execution, and by an action of *replevin* had been taken from his possession, whether, upon the death of the plaintiff pending the action of *replevin*, the sheriff had a right to *retake* the property and sell it on the execution? *id*

Decisions.

1. *Held*, that the proceedings upon the original writ of *replevin* conferred upon Mrs. Seitz a mere temporary right of possession, which expired with the abatement of the suit by her death, and that when that event occurred, the lien of the execution revived. No rights of third persons having intervened under her, the defendant was at liberty to *retake* the property by virtue of his former levy. *Burckle & Gebhard, Ex'rs.* agt. *Luce*, 344

2. The plaintiffs in this (2d) suit, as executors, succeeded to the rights of Mrs. Seitz, and nothing more. *id*

3. The action brought by Mrs. Seitz abated by her death, and could not be revived by *scire facias*. *id*

ACTION.

Questions.

1. Whether an action should be brought in the *name* of the *sheriff*, or his *deputy*, to recover back an excess of a bill of costs, paid by the deputy, to settle a suit against the sheriff, where the deputy declared that he paid it on his own account? *Britton & Hadley* agt. *Frink*. 4

2. Whether an excess of costs paid *without taxation*, can be recovered back by action? Does an *offer* to tax render the payment, without, a *voluntary* payment? *id*

Decisions.

1. An excess of costs paid to an attorney on the settlement of a suit, *without taxation*, may be recovered back by action. *Britton & Hadley* agt. *Frink*, 10

2. Payment of fees illegally demanded, is not a voluntary payment. *id*

3. A suit was properly brought by the sheriff, for an excess of costs paid by his deputy, although the deputy stated, when he paid the bill of costs, "that he should pay it himself, and bear the loss himself." It was a payment to and for the use of the sheriff, which discharged the suit against him; and was subsequently ratified by him in bringing the suit against the attorney. The sheriff was the only person who could disavow the acts of his deputy. *id*

Questions.

3. Whether plaintiff could recover under the common counts? The contract being alleged to be special and collateral. *Loomis agt. Monroe*, 22

See CORPORATIONS—Questions 1, 2, 3—*Decisions* 1, 2.

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See EVIDENCE—Questions 2, 3, 4—*Decisions* 1, 2.

AGREEMENT.

Questions.

1. Whether a written undertaking or agreement was *original* or *collateral*. *Loomis agt. Monroe*, 22

2. Whether the agreement did not come within the statute of frauds, for want of consideration? *id*

3. Whether plaintiff could recover under the common counts? The contract being alleged to be special and collateral. *id*

Decisions.

1. Where L. agreed (in writing) to sign off and relinquish all claim for damages sustained by him in the construction of a railroad through and across his land, provided the railroad company would pay (\$600) for the construction of an Arcade in front of a Hotel owned by L., and would stop their cars at that place, for the convenience of passengers—and L. offered to superintend the construction of the Arcade; and that \$500, at least, should be expended upon it—stating: "I sign this as a memorandum of what I offer to do with the company, if it shall be confirmed by the company"—and M., who was a stockholder and president of the company, executed a separate writing on his part, by which he engaged that, when the Arcade should be built, under the agreement of L., if the company should fail to make payment according to that agreement, he (M.) would, individually, pay L. therefor—*Held*, that the undertaking of M. was *collateral*, not original. In the absence of proof, that the railroad company had ever accepted or acted upon the proposition of L., although L. erected the Arcade, and then called upon M. for payment under his agreement, and M. said he expected to pay, and promised to do so; *held*, that the promise of M. was without consideration. There was nothing from which a request by M. to build the Arcade could be implied; and as the terms of his agreement was contingent and collateral, and the contingency not having happened, he was not legally bound. *Loomis agt. Monroe*, 28

See CONTRACT—Questions 3, 4.

POWER AND AUTHORITY—Questions 1—*Decisions* 1, 2

Questions.

4. Whether a *parol* agreement made on the 14th March, 1842, by which the plaintiff let to the defendant certain rooms in her dwelling house, for boarding and lodging of the defendant and

his wife, for a stipulated sum to be paid quarterly, *for the term of one year from the 1st of May, 1842*, was void by the statute of frauds—not being in writing? *Halsted* agt. *Spencer*, 319

5. Whether a settlement made with the plaintiff, by the defendant, in July, 1842, for the occupation of the rooms, to the 1st August, 1842, without board, from the 1st May preceding, whereby plaintiff made a deduction of one-half, and the defendant promised that he would not ask any more deductions, but would pay, *as he had agreed*, to the 1st May following, was a *new special contract* for the board and lodging of the defendant and his wife? *id*

Decisions.

2. Where a parol contract, for the use of rooms and board, was made in March, for one year, to commence on the first day of May then succeeding; and about the first of August thereafter a settlement was made between the parties for the first quarter, by which it was agreed, that on payment of a certain sum, to cancel the debt for that quarter, and a promise by the defendant to go on and make payment, as under the original agreement, for the remaining three quarters of the year; it was *held*, that the original contract was “not to be performed within one year from the making thereof,” and was consequently *void*. (2 R. S. 135, § 2.) That proof for the plaintiff, on a claim for the three quarters of the year, was inadmissible under the special count on the original contract; it was necessary there should be a count upon the special agreement made in August. The *amended* declaration containing such special count, the proof under it, on the second trial, was properly admitted, and the verdict for plaintiff sustained. *Halsted* agt. *Spencer*, 324

See BILLS OF EXCHANGE AND PROMISSORY NOTES—Questions 4–8—Decisions 4.

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ALLEGIANCE.

See JURISDICTION—Questions 2—Decisions 1, 2, 3, 4.

ASSESSORS AND ASSESSMENTS.

Questions.

1. Whether the *report* of the *assessors* of estimate and assessment for regulating and improving streets in the city of New-York, after being *confirmed by the common council*, is so *final and conclusive*, under the statute, as to preclude any inquiry into it, for error or irregularity? *Doughty* agt. *Hope*, 209

2. Where the *prima facie* presumption was that *all* three of the assessors met and consulted, although only *two* of them signed the estimate and assessment, whether the defendant was at liberty to rebut that presumption by showing that, in a point of *fact*, the third assessor did nothing beyond taking the oath of office? *id*

3. Whether the fact, that the third assessor did *not* act, could be *proved* by one who did act, as well as by the one who did not? *id*

4. Whether the publication of the *redemption notice* required to be published six weeks, twice a week, must *end prior* to the commencement of the last six months of the two years after sale? *id*

Decisions.

1. *Held*, that under the statute (2 R. L. 407, § 175,) it is not the *ratification* by the common council which is binding and conclusive, but the *estimate and assessment* when ratified. And it is only when an assessment has been *first duly made*, that the common council has the *power of ratification*. *Void* things are as *no* things. *Doughty* agt. *Hope*, *id*

2. But, if that act was good so far as it goes, it would only be one of several necessary links in the plaintiff's claims of title, and it is a well established rule in relation to these statute powers to transfer the title to land without the

consent of the owner, that the authority must be strictly pursued from beginning to end; if any material link in the chain be wanting, the whole proceeding will fall to the ground. *id*

3. The *prima facie* presumption in this case was, that all of the assessors met and consulted, although only two of them signed the estimate and assessment. But the defendant was at liberty to rebut that presumption, by showing that, in point of fact, the third assessor did nothing beyond taking the oath of office. *id*

4. And the fact that the third assessor did not act, might as well be *proved* by one who did act, as by one who did not. *id*

5. The jury having found that only two of the assessors acted, and that the third was not consulted, and there being nothing to obviate this difficulty, it is fatal to the proceedings. *id*

6. The *ratification* by the common council has not the force of a *judgment* of a court of record. *id*

7. Also, *held*, that the circuit judge was right in holding that the six weeks' publication (redemption notice) should have been completed *before* the commencement of the last six months of the two years after the sale, which is allowed for redeeming. *id*

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See *BILLS OF EXCHANGE AND PROMISSORY NOTES—Questions 5–8—Decisions 4.*

Questions.

1. Whether a bill filed by *two creditors*, sureties on custom house bonds, claiming, for that reason, priority above all other creditors, against a defendant, *assignee in trust* of an insolvent firm—the assignment being made to indemnify the assignee, as surety for the firm, also on custom house bonds—was defective for want of parties? *Bouchaud, ex'r agt. Dias & Furman*, 509

2. Whether, under the act of congress, (1799, *ch.* 123, § 65,) the *United States are preferred creditors*, where the insolvent debtor has only assigned his property for the purpose of paying or indemnifying a *single creditor* or surety, and not for the benefit of creditors generally?

That is, was it necessary that the bill should have been filed in behalf of *all the creditors* of the insolvent firm, where its object was to establish the right of priority in the United States, with regard to custom house bonds, paid by the complainants, and their subrogation in the place of the United States, by reason of such payment; and that the *assignee*, by reason of misapplication of the trust funds, be charged *personally*? *id*

3. Whether, if the complainants were entitled to subrogation in the place of the United States, they were equally, with the latter, protected against the operation of the *statute of limitations*? *id*

Decisions.

1. The court *held*, (BRONSON, J., delivering the opinion,) that the provision of the act of congress, (1799, *ch.* 123, § 65,) so far as it touched this question, only gives a priority to the United States in cases of insolvency, where a "debtor, not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof, for the benefit of his or her creditors." And that this provision never had been and never should be carried beyond cases where the debtor had made an assignment for the benefit of his *creditors in general*. Here the assignment was made for the benefit of Brunel alone. The bill could not be maintained. *Bouchaud, ex'r agt. Dias & Furman*, 522

Questions.

4. Whether the assignment which a debtor executes under the non-imprisonment law, (*Stat.* 1831, *p.* 400, §§ 16, 17,) is for the benefit of all his creditors, or whether the assigned property goes exclusively to the creditor who institutes the proceedings? *Spear & Ripley agt. Wardells*, 572

5. Whether a creditor, by commencing proceedings under the non-

imprisonment act of 1831, (although he acquires no lien upon the property of the debtor,) acquires a *preference* over other creditors, which cannot be defeated by a *voluntary assignment* made for the benefit of creditors generally? *id*

6. Whether a transfer of a debtor's property to a voluntary assignee, during the pendency of proceedings against him by a creditor, under the non-imprisonment law of 1831, is a fraud upon the law and the creditor instituting such proceedings, which a court of equity will not permit? *id*

Decisions.

2. WRIGHT, J., *held*, that these assignments (to Henry B. Wardell,) were made in fraud of the act, and of the rights of the appellants, acquired thereunder; and it was plainly to be perceived were so intended by the respondents themselves. For if, as they then contended, the statutory assignee would take for the benefit of all creditors, why, pending the proceedings, voluntarily make assignments having the like effect? Nothing could be more undoubted than that the respondents contemplated a fraudulent interference with the statutory assignment. *Spear & Ripley* agt. *Wardells*, 594

3. BRONSON, J., *held*, that although the appellants acquired no lien upon the property by commencing proceedings under the act, they acquired the right to a preference over the other creditors, which could not be defeated by a voluntary assignment; and the transfer of the property to Henry B. Wardell was a fraud upon the law and appellants, which a court of equity should not permit to succeed. *id*

ATTORNEY.

See POWER AND AUTHORITY—Questions 1—Decisions 1, 2.

AVOWRY.

See PLEADINGS—Questions 1, 2, 3—Decisions 1, 2, 3, 4.

B

BILL IN EQUITY.

See PLEADINGS—Questions 5-10—Decisions 5.

ASSIGNMENT FOR BENEFIT OF CREDITORS—*Questions 1, 2, 3, 4, 5, 6—Decisions 1, 2, 3.*

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SPECIFIC PERFORMANCE—*Questions 1, 2, 3—Decisions 1, 2, 3.*

USURY—*Questions 3, 4, 5—Decisions 2.*

LEGACIES AND LEGATEES—*Questions—1-7—Decisions 1.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Questions.

1. Whether the *acceptor* of a draft, after having paid it to an innocent holder, can recover back the amount, on ascertaining that *the name of the payee*, who had no interest in it, was a *forgery*? *Coggill* agt. *Leavitt, pres't, &c.*, 203

2. Whether, though the payee had no interest in the draft, yet, being a real person, his endorsement was essential to pass the bill? *id*

Decisions.

1. *Held*, that Truman Billings, the payee, never was the owner of the draft; nor was it drawn with the intent that he should either endorse it or have any interest or concern with it; consequently, he could not maintain an action upon it for his own benefit against any one; and, having no title, could in no event have a legal claim to the money. *Coggill* agt. *Leavitt, pres't, &c.*, 208

2. Not analogous to the case, where the payee is the *owner* of the bill, and could maintain an action upon it, both against the acceptors and drawers. *id*

3. Shapley & Billings having drawn the draft, and passed it to the bank with the name of the payee endorsed upon it,

by that act affirmed that the endorsement was genuine, so that the bill might *pass by delivery*; and would be es- topped from controverting the genuine- ness of the endorsement, in a suit against them by the bank. *id*

Questions.

3. Whether the word "protest" has been adopted, in legal and mercantile language, as comprehending *demand and notice*, when applied to a promissory note? *Coddington agt. Davis and others*, 376

4. Whether the following letter from the *endorser* to the *holders* of a promissory note was a waiver of demand of the maker, and notice of non-payment to the *endorser*?

"Messrs Davis, Brooks & Co.

Gents :—Please not protest T. B. Coddington's note due 2d February, for ten thousand dollars, and I will waive the necessity of the protest thereof.

And oblige, respectfully, &c.,

SAMUEL CODDINGTON.

New-York, January 28, 1840." *id*

5. Whether an *assignment* by the maker of the note, to one of the holders, (immediately prior to the maturity of the note,) of all his property for the benefit of his creditors, giving preference to the *endorser* for the amount of the note in question, exonerated the holders from demanding payment, and giving notice of non-payment? *id*

6. Whether a release and full discharge of all claims and demands, signed by the holders of the note and other creditors, to the *maker*, except what should be realized of said claims, &c., from the *assignment* made by the maker to one of the holders of the note, was such a discharge to the maker of the note as released the *endorser*? *id*

7. Whether a new agreement, executed by the maker, in consideration of the aforesaid release, executed by the holders of the note and other creditors, to pay the creditors at the expiration of seven years, whatever balance of said claims should remain unpaid out of the assets of said assignment, operated as a valid extension, to the maker, of the time of payment of such balance, by which the *endorser* upon the note in question was discharged? *id*

8. Whether, if the holders could not maintain an action against the maker on the note, until all the assigned property had been applied, and the balance remaining due thereby ascertained, their remedy against the *endorser* was not *suspended*? *id*

Decisions.

4. *See Coddington agt. Davis and others*. 392

See USURY—Questions 3, 4, 5—Decisions 2.

BOND AND MORTGAGE.

See FRAUD—Questions 1, 2, 3, 4—Decisions 1.

LEGACIES AND LEGATEES—*Questions 1-7—Decisions 1.*

BOUNDARY.

See TITLE—Questions 3, 4, 5.

CONTRACT—*Questions 5, 6—Decisions 1, 2.*

C

CERTIORARI.

See JUSTICES' COURTS—Decisions 2-8.

CHARTER PARTY.

See PRINCIPAL AND AGENT—Questions 1, 2—Decisions 1, 2.

CHATTEL MORTGAGE.

Questions.

1. Whether it is necessary, in order to sustain a judgment under a chattel mortgage, to show that proof was given on the trial, of the *residence* of the *mortgagor*, or that the property mortgaged was in the town at the time the mortgage was executed? (*Laws 1833, ch. 279, p. 402.*) And where such proof does not affirmatively appear, and

no objection being made on that ground at the trial, can advantage be taken of it afterwards, although the proof would be held necessary, if proper objection made? *Jencks* agt. *Smith*, 50

Decisions.

1. The court *held*, that if the return of the justice showed affirmatively, that proof was wanting of the residence of the mortgagor, and that it did not appear that the mortgage was filed in the town where the property was; and that objection was raised before the justice on account of the absence of it, the defect would be fatal. *Jencks* agt. *Smith*, 154

2. But where the return is merely silent on the point, and no objection appears to have been taken before the justice, and where opportunity is given for objection, and the party whose duty it is to object, remaining silent, all reasonable intendments will be made by this court to sustain the judgment. *Jencks* agt. *Smith*, 154

See EVIDENCE—Questions 26, 27—*Decisions* 30, 31, 32.

Questions.

2. Where a chattel mortgage, containing a condition that the mortgagor should at all times permit the mortgagee, his executors, &c., to have and possess, occupy and enjoy the property mortgaged, upon demand by him or them—Whether, where the mortgagee having possession of the property under the mortgage, the debt secured thereby not being due, the mortgagor has such an interest in the equity of redemption as can be sold on execution? *Mattison* agt. *Baucus*, 639

Decisions.

3. GARDINER, J., *held*, that the interest of Foster, the mortgagor and judgment debtor, was a right of redemption *only*—a mere chose in action; not the subject of a levy and sale upon execution, unless united with a right to the possession for a definite period. (3 *Wend.* 500.) By the express terms of the mortgage the mortgagee, “was at all times, upon demand, entitled to possess, occupy and enjoy” the property mortgaged; and the case showed that he had taken and held possession at the

time of the levy. *Mattison* agt. *Baucus*, 655

4. The levy, therefore, by the plaintiff, was wholly inoperative. It gave no lien upon the property, and consequently no right to maintain the action. *id*

COMMON SCHOOLS.

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See AGREEMENT—Questions 2—*Decisions* 1.

CONTRACT—Questions 3, 4.

Decisions.

1. The consideration of a promissory note is always inquirable into between the original parties. *Sherman* agt. *White*, 39

2. Under a plea of the general issue only, a *total* failure of consideration must be shown. *id*

3. Where a negotiation was carried on by letter, between the plaintiff and defendant, by which the defendant proposed and gave to plaintiff (at plaintiff's request,) his two promissory notes, to pay the debt of defendant's brother to plaintiff, and, simultaneously with the sending the notes, requested that a sheriff's certificate of sale, which plaintiff held against the brother, and which had been a subject of negotiation previously, might be assigned and sent to him; and it appeared that plaintiff had made the following inquiry of defendant, in a P. S. to one of his letters, “Shall I forward you, on receipt of notes, the ctf?” *Held*, on a suit by plaintiff against defendant on one of the notes, that the delivery of the certificate to defendant was a part of the original contract; and that, having received the notes and failing to deliver the certificate before suit brought, there was a total failure of consideration for the notes.

The execution of the assignment of

the certificate and holding it, was not equivalent to its delivery. *id*

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CONSIGNOR AND CONSIGNEE.

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CONSTITUTIONAL LAW.

Questions.

1. Whether the statute (*Sess. Laws*, 1842, p. 193,) extending the exemption of property from execution, applies to debts arising on *pre-existing contracts*? *Danks* agt. *Quackenbush*, 325

2. Whether that act, under a retrospective construction, is a law impairing the obligation of contracts, within the meaning of the constitution of the United States? *id*

Decisions.

1. Whether the act of 1842, extending the exemption of property from execution, can be applied to executions for pre-existing debts,—*Quere*? *Danks* agt. *Quackenbush*, 329

2. This act, under a retrospective construction, *held*, to be in violation of that provision of the constitution of the United States, which prohibits the states from passing any law impairing the obligation of contracts. *id*

Questions.

3. Whether advertising in this state a lottery and the sale of lottery tickets, to be drawn in another state, and authorized in the latter state, are within the prohibitions of our constitution and statute, (1 R. S. 665,) which forbids the formation of any lottery within this state? *Charles*, *imp'd* &c. agt. *The People*, 359

See INDICTMENT—Decisions 1.

4. Whether a citizen, who was and always had been a resident of another state, was liable, criminally, for acts committed (obtaining money by false

pretences,) in and against the laws of this state, by his procurement through innocent agents here? *Adams* agt. *The People*, 365

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CONSTRUCTIVE NOTICE.

See TRUST DEEDS—Questions 1-4—Decisions 1.

LEGACIES, AND LEGATEES—Questions 1-7—Decisions 1.

COSTS.

Questions.

1. Whether an excess of costs paid *without taxation*, can be recovered back by action? Does an *offer to tax*, render the payment without a *voluntary* payment? *Britton & Hadley* agt. *Frink*, 4

Decisions.

1. An excess of costs paid to an attorney on the settlement of a suit, *without taxation*, may be recovered back by action. *Britton & Hadley* agt. *Frink*, 10

2. Payment of fees illegally demanded, is not a voluntary payment. *id*

CONTRACT.

Questions.

1. Whether the *contract*, by virtue of which certain personal property was possessed, constituted a *sale* or *bailment*? *Moak* agt. *Foland*, 11

2. The *effect* of the contract, if considered a *bailment*. *id*

See AGREEMENT—Questions 1, 2, 3.

3. Did the *correspondence* between the parties close a contract, so that the defendant was liable upon his promissory note? *Sherman* agt. *White*, 29

4. Was the *proposition* of defendant a part of the contract, which required performance on the part of the plaintiff within a reasonable time? *id*

See CONSIDERATION—*Decisions* 1, 2, 3.

PRINCIPAL AND AGENT—*Questions* 1, 2.

AGREEMENT—*Questions* 4, 5—*Decisions* 2.

CONSTITUTIONAL LAW—*Questions* 1, 2—*Decisions* 1, 2.

5. Whether a written contract for the sale of land was void, for uncertainty in the description of the land contracted about? *Mead* agt. *Lawson*, 394

6. Whether, if the description of the premises was ambiguous, it was competent for the court to receive evidence of extrinsic circumstances to sustain the contract? *id*

Decisions.

1. In a contract for the conveyance of real estate, the description of the premises, to which any effect can be given, must be either perfectly certain of itself, or capable of being made so by a reference to something extrinsic the contract. *Mead* agt. *Lawson*, 401

2. That the parties know the localities, or parcel contracted for, is nothing; the written instrument is alone the only competent evidence of their object and intent. *id*

See FRAUD—*Questions* 1, 2, 3, 4—*Decisions* 1.

STATUTE OF FRAUDS—*Questions* 2, 3—*Decisions* 1, 2, 3.

SPECIFIC PERFORMANCE—*Questions* 1, 2, 3—*Decisions* 1, 2, 3.

CORPORATIONS.

Questions.

1. Whether an action brought against a stockholder of the Rossie Galena Company, individually, under the act incorporating that company, (*Stat. of 1837, p. 445*), for goods, wares, &c., delivered to the company, is an action founded upon the statute, and in the nature of a forfeiture, or upon the common law liability of the stockholder, as upon contract. *Corning & Horner* agt. *McCullough*, 126

2. Whether the statute of limitations—three or six years—applies in such a suit? *id*

3. Where the charter of a company contains an individual liability clause against its stockholders, to be enforced only after exhausting the legal remedy against the company, or on dissolution, are the stockholders, notwithstanding, liable at common law, originally and primarily, as partners or members of an incorporated association? *id*

Decisions.

1. The court decided that the suit was not an action upon a statute for a forfeiture or cause, the benefit and suit whereof is limited to the party aggrieved, therefore not barred by the short statute (three years) of limitation; that six years' statute of limitations applied in such suits. *Corning & Horner* agt. *McCullough*, 136

2. The court held, that the stockholder was originally and primarily liable, like partners or members of an unincorporated association. His liability was not created by statute. *id*

CRIMINAL LAW.

See INDICTMENT—*Questions* 1, 2, 3—*Decisions* 1, 2, 3.

JURISDICTION—*Questions* 1, 2—*Decisions* 1, 2, 3, 4.

D

DAMAGES.

Questions.

1. Whether the rule of damages in an action of trover, is the value of the goods at the time and place of conversion? *Caffe* agt. *Bertrand*, 224

2. Where there is conflicting testimony upon the subject of damages in such an action, whether the rule of damages is a question of law, not to be submitted to the jury? *id*

Decisions.

1. The principal point established in this case seems to be, that, the value of foreign goods, in an action of trover, is to be ascertained by the custom-house

appraisal of them here, if made near the time of conversion. *Caffe* agt. *Bertrand*, 230

DECLARATION.

See PLEADINGS—Questions 4–13—Decisions 6, 7.

DEMURRER.

See PLEADINGS—Questions 1, 2, 3, 5–10
13—Decisions 5, 6, 7.

USURY—Questions 3, 4, 5—Decisions 2.

DOWER.

Questions.

1. Whether the evidence in this case (action for ejectment for dower,) showed that the husband of defendant could have had no estate or interest in the premises in question, beyond that of a term of years, under a lease of surplus waters; and, therefore, the plaintiff was not entitled to dower? *Sparrow* agt. *Kingman*, 692

2. Whether the actual possession and use of the premises, by the plaintiff's husband—building mills thereon, and claiming to be the owner for four years—proved such an estate or seizin in the husband, as entitled her to dower therein? *id*

3. Whether, where the defendant held the premises in question under a *quit-claim deed* from the plaintiff's husband, and was in possession, he was *estopped* from showing that plaintiff's husband had no title? *id*

4. Whether the offer of defendant to show that plaintiff's husband never had any title to the premises in question, was properly excluded? *id*

Decisions

1. It was *held*, by WRIGHT, J., that he was content to place his vote for reversal, on the distinct ground that, in an action for dower, the grantee in fee of the husband is not concluded from affirmatively controverting the seizin of the latter. *Sparrow* agt. *Kingman*, 705

2. JEWETT, Ch. J., *held*, that the plaintiff was not entitled to dower in any other lands than in which her husband, during marriage, was seized of an estate of inheritance; and that when she claims dower, the defendant is at liberty to show, in his defence, that her husband was not, during the marriage, seized of such an estate. *id*

3. The court, in this case, were not authorized to say that Kingman assumed, by his deed (*quit-claim*), to convey a fee; the clear intent, as well as expression of his deed, was to convey only what interest or estate he then had in the premises. *id*

(*This decision overrules the principles settled by a series of cases determined by the supreme court, from Bancroft v. White, 1 Caines, 185, to Sherwood v. Vandenburg, 2 Hill, 303.*)

4. BRONSON, J., *dissenting*, *held* that, as to one half of the Erie mills, the defendant derived his title and possession from George G. Kingman, the plaintiff's husband; and still held under that title. So long as he thus held, he was *estopped* from denying the seizin of the husband, in an action brought by the widow to recover her dower. (*Citing authorities.*) Questionable as he thought this doctrine was at the first, it had prevailed too long in this state to be now overturned by a judicial decision. If there was any good reason for changing the rule, the change should be made by the legislature, and not by the courts. So long as those claiming under the husband have not been disturbed in the enjoyment of the property, there was no very good reason for allowing them to defeat the widow's claim to dower, by setting up an outstanding title which might never be asserted; and the current of adjudication had not carried the doctrine of *estoppel* beyond cases of that description. *id*

E

EJECTMENT.

Questions.

1. Whether the purchaser under a mortgage sale, who has received his deed, can bring ejectment before *confirmation of the sale*? And whether

the doctrine of *relation* applies after confirmation? *Van Geisen* agt. *Ful-*
ler, 240

See MORTGAGE FORCLOSURE AND SALE
Decisions 1-5.

PLEADINGS—Questions 6-9—De-
cisions 5.

ESCAPE.

See SHERIFF—Questions 1-6.

EVIDENCE.

Questions.

1. The sufficiency of evidence to authorize a recovery under a count, for an account stated. *Pierce* agt. *Dela-*
mater, 1

2. The effect of the admission or confession of a party, when resorted to as evidence against him. *id*

3. The sufficiency of admission to authorize judgment. *id*

4. Whether credit and effect should be given to defendant's statement "that he had a set off" where it was made at the time he admitted the correctness of plaintiff's account? *id*

Decisions.

1. The whole confession of a party, when resorted to as evidence against him, must be taken together, although it does not follow that all is entitled to credit. *Pierce* agt. *Delamater*, 4

2. The part of a confession which it is claimed makes against the party calling it out, must be certain and full; and enough to constitute a defence if proved by other testimony.

Hence, where a defendant admitted the correctness of an account that was shown him, but, at the same time, said he had "an offset," held, that the plaintiff's case was made out, and defendant was bound to prove his set-off on the trial. *id*

Questions.

5. Whether a question of fact was made out sufficient to establish a conversion? *Moak* agt. *Foland*, 11

6. The effect, in this court, on conflicting evidence of facts in a justices' court. *id*

Decisions.

3. Where questions of fact arise in a cause, before a justice of the peace, and evidence is given upon both sides in relation thereto, which is conflicting; it is for the justice to decide such questions, and having done so, this court will not reverse the judgment, although it may seem that the weight of evidence is against the decision. *Moak* agt. *Foland*, 21

Questions.

7. Whether the circuit judge erred in refusing to submit to the jury a question of fact, as to the true location of the deed under which title was derived. *French, jr.* agt. *Carhart*, 40

See TITLE—Questions—1, 2, 3—Decisions 1.

Questions in the Court of Errors.

8. By what general rule must a circuit judge be governed in withholding plaintiff's evidence on questions of fact, from the jury, and directing a non-suit? *Brown* agt. *The Mohawk & Hud. R. R. Co.*, 52

9. Whether plaintiff's evidence was sufficient to show that the defendants' railroad embankment and bridge, were so negligently and unskillfully constructed and done, as to have occasioned the injury complained of by the plaintiff? (*In sweeping away by a flood the railroad bridge and plaintiff's tannery and buildings below.*) And should the evidence have been submitted to the jury? *id*

10. Whether the evidence of the plaintiff did or did not show that the freshet or flood, which occasioned the damage complained of, was so unexpected and extraordinary in its character and extent that it could not have been reasonably anticipated or guarded against, but an act of PROVIDENCE, by which the plaintiff, as well as others, suffered? *id*

Questions in the Court of Appeals.

11. Whether the decision of the court of errors, in this case, established the proposition that the testimony of the plaintiff below was sufficient, in point of law, to authorize the jury to find a verdict against the defendants below, and that the supreme court would not have been justified in setting aside the verdict found upon such testimony? *id*

12. Whether the jury had found, by their verdict, the facts, and the only facts held to be necessary, by the court of errors, to entitle the plaintiff to a verdict? *id*

13. Whether the deed from the plaintiff to the defendants, authorized the latter to build their embankment without an opening, which plaintiff claimed should have been made to protect his buildings against floods? *id*

14. Whether the defendant's motion for a *non-suit* was properly overruled? *id*

15. Whether the *judgments* and *opinions* of a portion of plaintiff's witnesses (not experts) were properly received in evidence? *id*

16. Whether the evidence of what the plaintiff said to the engineer of the defendants who had charge of building the bridge, at the time of its construction, about its sufficiency, was properly received? *id*

17. Whether, when the *opinions* of plaintiff's witnesses were called for, and the defendants objected that the evidence was *illegal* and *improper*; not that the witnesses were not men of science or skill, that they were not experts; that the objection went to the *nature of the evidence*, or to the *qualifications of the witnesses*? Should the objection have been *distinctly taken*, that the witnesses were *not experts*, to have legally excluded their *opinions* as evidence? *id*

Decisions.

4. That *testimony* is insufficient in point of law to sustain a suit, where it would be the duty of the court to set aside the verdict and grant a new trial if the jury found a verdict in favor of

the plaintiff. *Brown agt. Mohawk & Hud. R. R. Co.* 125

5. But, where the testimony is sufficient to sustain a verdict in favor of a plaintiff, if the jury should find one in his favor, the questions of fact should be submitted to the jury; although the circuit judge may think the evidence leaves the case in so much doubt, that the jury would be justified in finding a verdict for defendant. *id*

6. The grantees in an important public franchise, should so exercise their privileges and rights as not to injure or impair the rights of others. *id*

7. It is their duty to exercise such forecast and precaution, in the construction and use of their works, as that the property of others, using ordinary prudence, should remain safe from any danger or injury therefrom. *id*

8. And where it is alleged that proper precaution, care and prudence have not been exercised and used in and about the construction and use of such public works, it is a proper case to be determined by the testimony of those who are familiar with all the circumstances connected with the location and construction, which are clearly matters of fact, upon which parties litigant have a right to the judgment of a jury. *id*

9. *Held*, that the testimony in this case, taken altogether, (on the first trial,) was of such a character and degree, as fairly to entitle the plaintiff to the verdict of a jury upon it, and that it should have been submitted to the jury for that purpose. (COURT OF ERRORS.) *id*

10. THE COURT OF APPEALS—*held*, that the *judgments* and *opinions* of the plaintiff's witnesses should have been excluded under the objections made, that the testimony was *illegal* and *improper*. That the objections went to the *qualifications of the witnesses*, and not to the *nature of the evidence*. *id*

11. It was not necessary to make the distinct objection, that the witnesses *were not experts*. *id*

Questions.

18. Whether it is necessary, in order

to sustain a judgment under a chattel mortgage, to show that proof was given on the trial, of the *residence* of the *mortgagor*, or that the property mortgaged *was in the town* at the time the mortgage was executed? (*Laws* 1833, *ch.* 279, *p.* 402.) And where such proof does not affirmatively appear, and no objection being made on that ground at the trial, can advantage be taken of it afterwards, although the proof would be held necessary, if proper objection made? *Jencks* agt. *Smith*, 150

Decisions.

12. The court *held*, that if the return of the justice showed affirmatively that proof was wanting of the residence of the mortgagor, and that it did not appear that the mortgage was filed in the town where the property was; and that objection was raised before the justice on account of the absence of it, the defect would be fatal. *Jencks* agt. *Smith*, 154

13. But where the return is merely silent on the point, and no objection appears to have been taken before the justice, and where opportunity is given for objection, and the party, whose duty it is to object, remaining silent, all reasonable intendments will be made by this court to sustain the judgment. *id*

Questions.

19. Whether a deed acknowledged before a commissioner of deeds, in his county, could be read in evidence, (under the *Laws* of 1833, *ch.* 271, § 19,) at the circuit in another county, without the certificate of the clerk of the former county, required by § 18 of the statute, (1 *R. S.* 749, § 18,) "of the proof and recording of deeds?" *Wood*, *ex'r.* agt. *Weiant and others*, 155

Decisions.

14. The court affirmed the judgment in this case, with an expression of approval of the opinion of the circuit judge upon one point only, to wit: that the law of 1833, (*ch.* 271, § 19,) had not changed the statute (2 *R. S.* 325, § 74,) in relation to the reading of deeds in evidence; that the county clerk's certificate was still necessary. *Wood*, *ex'r.* agt. *Weiant and others*, 172

15. *JEWETT*, Ch. J., arrives at the following results:—That although the facts in the case did not warrant so strong an expression of opinion, in the charge of the circuit judge, as to the controlling effect of the deeds, yet, that the *exception* to the charge did not raise any *legal question*. *id*

16. There was no error in allowing the defendant to give evidence of the interest of the witness *Morgan*, in the event of the suit, to affect his *credit*. *id*

17. Nor in rejecting the *deed* offered in evidence, on the ground that it had been acknowledged in another county, before a commissioner of deeds, and that there was no *certificate* required by the statute. *id*

18. That the *existence* of a *monument*, making a boundary between lands, could not be proved by *general reputation*. *id*

19. That the *declarations* of a chain-bearer, (now dead,) in running a boundary line, made not at the time of the running of the line, but *afterwards*, is not a part of the *res gestæ*, and are inadmissible as evidence. *id*

20. It is otherwise, where such declarations are offered to be proved as made *at the time of the survey*. *id*

21. And on the same principle, the declarations of a *surveyor*, made *subsequent* to the survey, are inadmissible as evidence to show a boundary line or monument, although he is claimed to have been the *agent* of both parties. *id*

22. Because, the declarations of an agent must be confined to such statements as are made by him, either at the time of the act done by him as such, or acting within the scope of his authority. *id*

23. But the *declarations* of a *surveyor*, (now dead,) made *at the time he made the survey*, giving certain reasons for stopping the course and distance where he did, &c., is *competent evidence*. It is a part of the *res gestæ*. *id*

24. *GARDINER*, J., discusses but one point in his opinion, and arrives at the same conclusion thereon as Judge

JEWETT, to wit: That if a surveyor was authorized to establish a monument at all, that authority included the right to *declare the purpose* for which it was established. And the plaintiff had a right to show such declarations as a part of the *res gestæ*. *id*

See WITNESS—Questions 1, 2, 3, 4—
Decisions 1, 2.

Questions.

20. Whether the *opinion* of a witness, to prove that certain matter published in a newspaper was "*the reports*" of the plaintiff, was competent evidence? The question was this:—"From that printed copy, can you state whose reports they were?" *Lee* agt. *Bennett*, 187

21. Whether the *evidence*, relied upon before the justice to *raise a promise* on the part of the defendant below, (*Bennett*, editor and proprietor of the *Herald*), to pay the plaintiff, (*Lee*), for reporting, was sufficient for that purpose? *id*

Decisions.

25. The supreme court *held*, (*Jewett*, Justice, delivering the opinion,) that assuming that the defendant was the editor and proprietor of the *New-York Herald*, as the history of the trial showed that both parties did—it did not show any employment of the plaintiff, by the defendant, to render the services he claimed to have rendered; and that the justice correctly decided the case upon the evidence. *Lee* agt. *Bennett*, 202

26. The rule which requires witnesses to testify to facts from knowledge, and not from belief, justified the decision of the justice in excluding the question put to the witness *Doyle*, to wit: "From that printed copy, can you state whose reports they were?" There are exceptions to this rule. On questions of skill and judgment, men of science and experience are allowed to give their opinion in evidence. (23 *Wend*. 425.) But this does not come within any exceptions to the rule. *id*

27. In relation to the point that the justice erred in excluding the evidence as to the declarations of the foreman in the defendant's establishment—*held*,

that it was necessary that it should have appeared in evidence that he was the agent of the defendant, transacting business for him, and that such declarations were made in relation to that business, and while engaged in it. There being no such evidence, the evidence offered was properly excluded. *id*

See ASSESSORS AND ASSESSMENTS—
Questions 1, 2, 3, 4—Decisions
1-7.

Questions.

22. Whether an *execution* issued pursuant to an order of the court, as a *substitute* for the *original*, which was lost, could properly be introduced and received as *primary* evidence? *Burckle & Gebhard*, *Ex'rs*, agt. *Luce*, 330

Decisions.

28. *Held*, that there was no necessity of proving the loss of the original execution upon the trial, in order to give in evidence its substitute ordered by the supreme court. *Burckle & Gebhard*, *Ex'rs*, agt. *Luce*, 344

See JUSTICES' COURTS—Decisions 5, 6.

Questions.

The *condition* of an *adjournment bond*, given in an action before a justice of the peace, was, "That, if no part of the property of the said defendant, liable to be taken on execution, shall be removed, secreted, assigned, or in any way disposed of, (except for the necessary support of himself and family,) until the said demand of the said plaintiff shall be satisfied, or until the expiration of ten days after the said plaintiff shall be entitled to have an execution issued on the judgment in the said cause, if he shall obtain such judgment." In an action for a breach of the condition of this bond, where the *surety* alone appeared, the following questions arose:—

23. Whether, on proof of sale, by defendant in the original suit, of a *load of hay*, it was competent evidence for the defendant in this action to show the purchase, by the defendant in the original suit, of flour, fish and tea, and the support of his family; *unless* he also showed that the *money received for*

the hay was used for that purpose, and was necessary? Judson agt. Houghton, 401

24. Whether it was absolutely necessary to give *direct proof*, that the money received for the hay was required for the support of the defendant, or his family, or that it was so expended? Whether it might not be *inferred*? *id*

25. Whether, in order to justify the inference that the money was thus applied, it was competent to show the number of persons who composed defendant's family, and their reasonable and necessary weekly expenses? *id*

26. Whether it was a breach of the condition of the bond, by the defendant in the original suit, in having some months previous to that suit, sold some personal property, and took a *mortgage* back for security, which mortgage, *at the time received*, he, by PAROL, agreed to assign to a third person, in consideration that the latter would cancel a mortgage he held on the same property; but, which *assignment was not, in fact, made until after this adjournment bond was given?* *id*

27. Whether it was competent to receive evidence of the *parol agreement* to assign the mortgage? *id*

Decisions.

29. In an action for a breach of the conditions of an *adjournment bond*, given on a trial before a justice of the peace,

Held, on proving that the principal had sold property liable to execution pending the adjournment, that the *surety* on the bond (the only defendant who appeared) might show, that the property had been disposed of for the *necessary support of the principal and his family.* Judson agt. Houghton, 418

30 Also *held*, that it was not absolutely necessary to give *direct proof* that the money received for the property sold, was required for the support of the principal or his family, or that it was so expended. These might be *inferred*; and, in order to justify the inference, it was competent to show the number of persons who composed the family of the principal, and their reasonable and necessary weekly expenses. *id*

31. *Held*, also, on proving that the principal was the owner and holder of a mortgage of personal property, which he had assigned to the surety during the existence of the bond; that it was competent for the surety, the defendant in this suit, to show that the principal had made a *verbal contract* for a valuable consideration, to assign the mortgage some months previous to executing the adjournment bond; that the mortgage thus assigned was, in equity, *the property* of the assignee before the assignment was made, and the formal execution of it was in no respect illegal or improper. *id*

32. The execution of this assignment being a discharge only of a prior binding obligation, it took effect by relation from the time of the agreement to assign. But without the assignment, the mortgagee had such an equitable claim and preference upon the mortgage, as to have enabled him to enforce it in chancery, over any right or interest the plaintiff in the execution might have acquired by a levy. *id*

33. Besides, it is settled that before forfeiture of a mortgage, the interest of the mortgagee in personal property mortgaged, is not the subject of levy and sale on execution. There being no forfeiture of the mortgage in this case, there was no breach of the condition of the bond by the assignment. *id*

See REPLEVIN—Questions 3, 4.

TRUST DEEDS—Questions 1, 2, 3, 4—Decisions 1.

INSURANCE COMPANIES—Questions 1, 2—Decisions 1, 2, 3.

WITNESS—Questions 7—Decisions 6, 7, 8.

TROVER AND CONVERSION—Questions 5, 6, 7.

Questions.

28. Whether the evidence in this case showed a *sale and delivery* of a pile of lumber? Shindler agt. Houston, 680

29. Whether the agreement of the parties was within the statute of frauds—there being something to be done, to complete a sale and delivery? *id*

Decisions.

34. See Shindler agt. Houston, 691

See DOWER—Questions 1, 2, 3, 4.
 SPECIFIC PERFORMANCE—Questions
 1, 2, 3—Decisions 1, 2, 3.
 SHERIFF—Questions 1-6.

EXCEPTIONS.

Questions.

1. Whether the matters set up in the answer of the defendant, Seth B. Roberts, to the amendments of the complainants' bill of complaint, and the schedules annexed, *excepted to* by the complainants, were *impertinent*? *Roberts* agt. *Jones & Bogert*, 315

2. Whether such matters should be struck out for *prolixity*? *id*

Decisions.

1. Where the defendant, in his answer, went into a long detailed statement, by which he designed to show that there was an error in accounting in a former suit between the parties, whereby he had been unjustly decreed to pay a large sum of money, and thereby was not insolvent as alleged—*held*, that that part of the answer was *impertinent*, for *prolixity*. The defendant could have raised the question of insolvency, by a statement of the *fact* of such an error in accounting. (If that question could be raised at all in such a collateral way.) *Roberts* agt. *Jones & Bogert*, 319

2. A man is not the less insolvent because he has been obliged to pay a large sum of money, under a decree against him, which is alleged to be unjust, if he has no legal or equitable means of recovering it back. *id*

See SHERIFF—Questions 1-6—Decisions?

EXECUTION.

See EXECUTORS AND ADMINISTRATORS—Questions 2—Decisions 9, 10.

EXEMPTION—Questions 1, 2—Decisions 1, 2.

PROPERTY—Questions 2, 3—Decisions 1, 2.

Questions.

1. Whether an *execution* issued pursuant to an order of the court, as a *substitute* for the *original*, which was lost, could properly be introduced and received as *primary* evidence? *Burckle & Gebhard*, *Ex'rs*, agt. *Luce*, 330

Decisions.

1. *Held*, that there was no necessity of proving the loss of the original execution upon the trial, in order to give in evidence its substitute ordered by the supreme court. *Burckle & Gebhard*, *Ex'rs*, agt. *Luce*, 344

EXECUTORS AND ADMINISTRATORS.

Questions.

1. As to proper parties. *Wambaugh* agt. *Gates and Wife and others*, 247

2. Whether *lands* aliened in good faith, by an heir at law, or devisee, before the commencement of a suit, for the recovery of a *debt* due from the testator or intestate, for which judgment had been recovered against the executors and execution returned unsatisfied, is *liable* in the hands of the purchaser, for the payment of such debt? *id*

3. Whether a creditor of a testator must not first exhaust all his remedy against the personal estate of the decedent, or show that there is no personal property, before he can file a bill to enforce an equitable lien upon the interest of legatees in lands whose legacies are charged thereon? *id*

Decisions.

1. *Held*, that *personal estate* is first liable, at law and in equity, for the payment of the *debts* of a testator. The *real estate*, in case of insufficient personal estate, is next liable, except such as is expressly charged with the payment of debts. *Wambaugh* agt. *Gates and Wife and others*, 270

2. Where legacies are made payable, and have been paid out of the personal estate, the legatees in general, are bound

to *refund* where the personal estate proves insufficient to pay the debts. *id*

3. In this case, the complainant, by his bill, must make title, if at all, against the defendants as *legatees* or *devisees* of the testator. Not having *jointly* sued *all* of the *legatees*, or any single legatee separately, and not having made *all* of the *devisees* parties, under the provisions of the statute, there is a fatal defect of *parties*. *id*

4. As against a purchaser under a judgment against Samuel and Philip Boyer, as executors, or as against them generally, the *prior conveyance* (to Poultney and Ellicott,) is presumed to have been fairly made upon the consideration expressed in it. If it is claimed to be fraudulent, the burden of showing it is with the other side. *id*

5. If the judgment had been recovered against Samuel and Philip Boyer, as *heirs* or *devisees*, and the land sold under it had descended from or been devised to them by the testator, then a prior *bona fide purchaser* to the judgment would be bound to show that the heir or devisee had alienated the land in *good faith*. *id*

6. If the complainant claims to recover against Gates and wife, Beard and wife, and Van Derin, as *legatees*, he has failed to show, by his bill, that either of them have ever been paid any portion of their legacies. *id*

7. If he claims to recover against them as *heirs*, he has omitted to allege that the personal assets of the deceased were not sufficient, originally, to pay his debts, or that all the proper proceedings and remedies before the surrogate, and at law, had been instituted against the personal representatives, and exhausted. *id*

8. And if he claims against them as *devisees*, he has omitted to allege or show that the personal assets of the testator, and the real estate which descended to his heirs, were insufficient to discharge his debts, or after proceedings against the personal representatives, next of kin, legatees, or heirs-at-law, before the surrogate and at law, he had been unable to recover the debt or some part thereof. *id*

9. The issuing of the execution upon

the judgment recovered against the executors, and its return unsatisfied, was no evidence that there was not, in fact, sufficient personal assets originally, or even then, to satisfy the judgment, or that the debt or demand could not be recovered from the executors personally, if the proper steps to call them to account were instituted. *id*

10. The complainant's judgment being against the defendants, as executors, and the amount thereof to be levied of the goods and chattels which were of the testator at the time of his death, in their hands to be administered; and if they had not so much in their hands to be administered, then the amount of costs and charges to be levied of the proper goods and chattels of the executors personally, it never was a *lien* upon any *real estate*. *id*

11. There was enough in the pleadings and proofs to entitle the complainant to the decree made by the chancellor against S. Boyer. *id*

Questions.

4. Whether a *surrogate* has jurisdiction under the statute, (2 R. S. 110, § 57,) to call an executor to an *account* for the *rents*, *issues* and *profits* of the *real estate*, where the same was sold not in pursuance of an order, but by directions in the will, which devised the real estate to him upon trust, to sell whenever he should see fit? *Stagg, ex'r agt. Jackson and Wife*, 561

5. Whether such accounting by the executor, should be as *executor* under the statute, or as *trustee in equity*? *id*

6. Whether, by the *devise* of the real estate to the executor, and by the whole provisions of the will, the real and personal property was blended in one common fund, which amounted to a *conversion* of the real estate into *personalty at the death of the testator*, upon the doctrine of *equitable conversion*? *id*

Decisions

12. JEWETT, Ch. J., delivered the opinion of the court. *Held*, that independent of the statute (2 R. S. 110, § 57,) and the provisions of § 75 of the statute of 1837, ch. 460, the surrogate's

court had the jurisdiction claimed by it. *Stagg, ex'r, agt. Jackson and Wife*, 571

13. That by the provisions of the will it was manifest that the testator intended that his whole estate, real and personal, together with the rents, profits, and income intermediate the sale, should become united in one common money fund, for the sole purpose of division and distribution among the objects of his bounty; and upon the principle of equitable conversion, the real estate was converted, by the devise and discretion to sell, into personalty, from the death of the testator; the money arising from the sale thereof, became legal assets in the hands of the executor, when received by him, and for which, as executor, he was bound to account as personal estate. *id*

EXEMPTION.

Questions.

1. Whether the statute (*Sess. Laws*, 1842, p. 193,) extending the exemption of property from execution, applies to debts arising on *pre-existing contracts*? *Danks agt. Quackenbush*, 325

2. Whether that act, under a retrospective construction, is a law impairing the obligation of contracts, within the meaning of the constitution of the United States? *id*

Decisions.

1. Whether the act of 1842, extending the exemption of property from execution, can be applied to executions for pre-existing debts,—*Quere?* *Danks agt. Quackenbush*, 329

2. This act, under a retrospective construction, *held* to be in violation of that provision of the constitution of the United States, which prohibits the states from passing any law impairing the obligation of contracts. *id*

F

FORGED ENDORSEMENT.

See *BILLS OF EXCHANGE AND PROMISSORY NOTES*—*Questions* 1, 2—*Decisions* 1, 2, 3.

FRAUD.

See *TRUST DEEDS*—*Questions* 1, 2, 3, 4—*Decisions* 1.

Questions.

1. Whether the *bond and mortgage* given by the respondent, and which, by his bill, he sought to have cancelled, were procured by *fraud*? *Bell agt. Stainer*, 522

2. Whether the respondent failed to make out the case of fraud alleged in his bill? *id*

3. Where the fraud alleged in the bill was, that James H. Bell, at the time he agreed to sell the lots to the agent of the respondent, pretended to be the owner thereof; that he never had any legal or equitable title whatever to said premises, but so pretended to be the owner thereof to defraud the respondent; that he only had a contract of sale thereof from the owner, which contract was only in the nature of a conditional sale; and that he concealed the existence of said conditional sale to defraud the respondent; whether the evidence was sufficient to overcome the answer of James H. Bell, which, being responsive to the bill, denied the allegations of fraud? *id*

4. Whether the respondent, (the complainant,) by any act of his subsequent to the giving of the bond and mortgage, waived or barred his defence to the enforcement thereof, in the hands of Isaac Bell, the assignee? *id*

Decisions.

1. *JEWETT, Ch. J., held*, that the case failed to show that James H. Bell was guilty of the fraud charged in the bill, either in making the contract or in its consummation, by giving the deed and taking the bond and mortgage; and that it was unnecessary to consider whether the complainant, by any act of his subsequently, waived or barred his defence to the bond and mortgage in the hands of Isaac Bell. *Bell agt. Stainer*, 547

See *TRADE MARK*—*Questions* 1-5—*Decisions* 1, 2, 3.

ASSIGNMENT FOR BENEFIT OF CREDITORS—*Questions* 4, 5, 6—*Decisions* 2, 3.

SHERIFF—*Questions* 1-6.

FREIGHT.

Questions.

1. Whether goods delivered into *public store*, on general order to discharge the ship, is a delivery to the *consignee*; and such a receipt of the goods by the consignee, as binds him to pay the freight? *Funck* agt. *Merian & Benard*, 659

2. Where the consignee endorses over the bills of lading, which are made payable to his order, and the assignee receives the goods—a portion from the ship, and the remainder from the public store; whether the *consignee* is still liable to the ship owner or master for the payment of the freight, or whether the *assignee* only is responsible? *id*

Decisions.

1. As there does not appear to be any written opinion by this court, it is presumed, they adopted the opinion of the supreme court, (4 *Denio*, 110,) *JEWETT*, justice, which *held*,—That the obligation to pay freight rested on the bill of lading, by which its payment was made a condition of delivery to the consignee or his order. The master was not bound to part with the goods until the freight was paid; but did not, by delivering the goods before payment, waive or discharge his legal right to demand payment of the person who, by the principle of law, was primarily liable to pay. *Funck* agt. *Merian & Benard*, 679

2. It was well settled, that when the goods, by the terms of the bill of lading, are to be delivered to the *consignee* or to his order on payment of freight; the party receiving them, whether the consignee, or endorsee, to whom the bill of lading has been transferred by the consignee, makes himself responsible for the payment of the freight. The law implies a promise on his part to pay the freight; such being the terms on which, by the bill of lading, the goods were to be delivered. By the act of accepting and receiving, the party makes himself a party to the contract. *id*

3. In this case, the goods were consigned to the defendants, or to their order. They endorsed the bills of lading, and ordered a delivery to Mainon

& Bonnay, to whom the goods were delivered. *They*, and not the defendants, were therefore bound to pay the freight. *id*

H

HEIRS AND DEVISEES.

See EXECUTORS AND ADMINISTRATION—*Questions* 1, 2, 3, 4, 5, 6—*Decisions* 1–11, 12, 13.

WILL—*Questions* 1, 2, 3—*Decisions* 1, 2, 3.

PLEADINGS—*Questions* 5–10—*Decisions* 5.

LEGACIES AND LEGATEES—*Questions* 1–7—*Decisions* 1.

I

INDICTMENT.

Questions.

1. Whether advertising in this state a lottery and the sale of lottery tickets, to be drawn in another state, and authorized in the latter state, are within the prohibitions of our constitution and statute, (1 *R. S.* 665,) which forbids the formation of any lottery within this state? *Charles, imp'd, &c.* agt. *The People*, 359

2. Whether it is necessary to aver, expressly, in an indictment, that the lottery is not authorized by law? *id*

3. Whether an indictment is defective, in not averring for what purpose the lottery in question is set on foot, where it sets forth in *extenso* the advertisement, by which it is apparent that the prizes consist of money? *id*

Decisions.

1. *Held*, that the words “such illegal lottery” in the 28th section of the statute, (1 *R. S.* 665,) relate not solely to the particular kind described in the 27th section, but to *all* lotteries; as all are, by the 26th section, declared to be “unlawful, and common, and public nuisances.” (*See People v. Sturtevant*, 23 *Wend.* 418.) *Charles, imp'd &c.* agt. *The People*, 365

2. Consequently, in an indictment for such an offence, drawn under § 28, a general averment of publication is sufficient. *id*

3. But, it was not necessary to directly and expressly allege in the indictment that the lottery, of which the defendant published an account, was opened or set on foot for the purpose of disposing of money or other property, as that fact appeared from the advertisement set out in the indictment; and, according to the decision in *The People* agt. *Rynders*, (12 *Wend.* 425,) was good pleading in criminal cases. *id*

See JURISDICTION—Questions 2—Decisions 1, 2, 3, 4.

INSURANCE COMPANIES.

Questions.

1. Whether the circuit judge admitted improper and illegal evidence to be given to the jury, in showing, or tending to show, that the secretary of the company had waived the delivery of the *preliminary proofs* of the loss within the time required by the laws and conditions of the policy of the company? *Mutual Ins. Co., Albany*, agt. *Conover*, 604

And, whether the testimony of the secretary, that he was in the habit of using his discretion in consenting to the *assignments of policies*, was properly admitted? *id*

2. Whether, by the by-laws and policy of the company, the secretary had authority to assent to the giving of a mortgage upon the premises insured, by the assured, and to give a written consent to an assignment of the policy to the mortgagee? *id*

Decisions.

1. JOHNSON, J., *held*, that whether there was a variance between the declaration and proof was not material to inquire, as it was at most only such a one as the circuit judge might properly disregard on the trial, and upon which no bill of exceptions would lie. *Mutual Ins. Co. Albany*, agt. *Conover*, 619

2. That the consent of the assignment of the policy, by the secretary, to enable the plaintiff to procure a loan, by a mortgage upon the insured property, was binding upon the company. *id*

3 GRAY, J., in a short opinion, expressed substantially the same views. *id*

J

JAIL LIMITS.

See SHERIFF—Questions 1-6.

JURISDICTION.

Questions.

1. Whether an action of *trespass quare clausum fregit*, may be brought in a justices' court of a different county from that in which the land lies? *McKeon* agt. *Graves & Best*, 345

See JUSTICES' COURTS—Decisions 6, 7, 8.

2. Whether a citizen, who was and always had been a resident of another state, was liable, criminally, for acts committed (obtaining money by false pretences,) in and against the laws of this state, by his procurement through innocent agents here? *Adams* agt. *The People*, 365

Decisions.

1. GARDINER, J., delivered the opinion of the court, in which BRONSON, J., concurred, by stating the conclusions at which he arrived.

Held, that the defendant may be rightly punished. He had violated a law to which he owed obedience, for it was written upon his own conscience, and obligatory everywhere. To that law, the statute of this state has affixed a penalty, to be enforced in her own tribunals for the protection of her own citizens. *Adams* agt. *The People*, 376

2. The immunity he enjoyed at home from arrest and punishment, was not due to him as a criminal, or as a citizen of Ohio, but because he had injured

no one whom that state was bound to protect; and, because the inviolability of its territory was an essential to its sovereignty and independence. The prisoner knew that, through his agent, he was defrauding those who were entitled to the protection of our laws, and he cannot be permitted to say that he did not know that it was unlawful to cheat in New-York as well as in Ohio. (*Per GARDINER, J.*) *id*

3. Also, *held*, that it was not a matter of any importance, whether the defendant owed allegiance to this state or not. But two cases where the question of allegiance can have anything to do with a criminal prosecution :

1st. Treason ;

2d. Where the government proposes to punish offences committed by its own citizens, beyond the territorial limits of the state. When the offence, not being treason, is committed within this state, the question of allegiance nothing to do with the matter. *id*

4. Jurisdiction of the offence, or subject matter, and jurisdiction to try the offender, are very different things. The first exists, whenever the offence was committed within this state ; and the second, when the offender is brought into court, and not before. And this is so, whether he be a citizen or not. (*Per BRONSON, J.*) *id*

See PLEADINGS—Questions 6, 7—Decisions 5.

MARRIED WOMAN—Decisions 1.

EXECUTORS AND ADMINISTRATORS—Questions 4, 5, 6—Decisions 12, 13.

Questions.

3. Whether a justice of the peace has jurisdiction of an action, brought against the trustees of a school district, to recover a portion of a school teacher's wages, where the question has been submitted by the trustees to the county superintendent of common schools, and decided by him? *Reynolds* agt. *Mynard and others*, 620

Decisions.

5. JOHNSON, J., *held*, that the justice had jurisdiction in the case. That the decision of the deputy superintendent did not bar the action. That the plaintiff was the aggrieved party, who only

could appeal ; and, that he was not bound to appeal, as the statute had not taken away the jurisdiction of courts of law in such cases. *Reynolds* agt. *Mynard and others*, 625

JUSTICES' COURTS.

See EVIDENCE—Questions 5, 6—Decisions 12, 13.

Decisions.

1. Where questions of fact arise in a cause, before a justice of the peace, and evidence is given upon both sides in relation thereto, which is conflicting ; it is for the justice to decide such questions ; and, having done so, this court will not reverse the judgment, although it may seem that the weight of evidence is against his decision. *Moak* agt. *Folland*, 21

Questions.

1. Whether a declaration in a justices' court, in the following form, is good in form or substance ? to wit :

"The plaintiffs appeared and declared against the defendant, in an action of trespass, and for breaking in, and destroying, and taking from the premises of plaintiffs, certain boards and other fencing stuffs, and converted the same to his own use." *McKeon* agt. *Graves & Best*, 345

2. Whether an action of *trespass quare clausum fregit*, may be brought in a justices' court, of a different county from that in which the land lies ? *id*

Decisions.

2. It is not necessary that a return of a justice of the peace to a *certiorari*, should show that he waited one hour after the time, for the return of the process, (2 R. S. 234, § 46,) before he entered judgment. The court will intend that the justice waited the requisite time. *McKeon* agt. *Graves & Best*, 355

3. It is a settled principle, that before a judgment can be reversed, it must appear affirmatively that the justice has erred. *id*

4. A declaration in a justice's court, may be so general and informal as to be bad on *special demurrer*, but good on *general demurrer*. And, in such case, the common pleas, on *certiorari*, (2 R. S. 257, § 181,) is authorized to disregard technical omissions, imperfections or defects, not affecting the merits, and give judgment as the right of the matter may appear. (*See, also*, 2 R. S. 424, § 7, *providing for amendment of pleadings, &c.*) *id*

5. Where the declaration was for trespass, and for *breaking in*, and destroying, and taking from the plaintiffs' premises, certain boards, &c.; and the proof was, that the defendant *took boards*, about fifty panels, *from plaintiffs' fence, &c.*: *Held*, that the evidence was sufficient to authorize a court or jury, at least, to infer a *breaking in* in the premises, from which the boards were taken. *id*

6. It is not necessary that it should appear, *affirmatively*, that the *premises* on which a trespass alleged to have been committed, were situated in the *county where the justice of the peace resides*. The legislature has conferred jurisdiction upon justices of the peace, (2 R. S. 225, § 2; *Laws*, 1840, *ch.* 317, § 2,) of the action of trespass on lands, whether the cause of action arise in the county where the justice resides or not. *id*

7. Although courts of common pleas had not *original* jurisdiction in such actions of trespass, &c., (arising out of the county,) yet they had jurisdiction on *certiorari*, or on appeal from justices' courts, in such cases. *id*

8. Where it appears that a justice of the peace, in an action of trespass on lands, has jurisdiction of the parties, and generally of the subject matter, an appellate court will not intend that the trespass was committed on lands situated *out of the state*. *id*

See EVIDENCE—Questions 23–27—Decisions 28–32.

JURISDICTION—Questions 3—Decisions 5.

L

LEGACIES AND LEGATEES.

See EXECUTORS AND ADMINISTRATORS—Questions 1, 2, 3, 4, 5, 6—Decisions 1–11.

WILL—Questions 1, 2, 3—Decisions 1, 2, 3.

Questions.

1. Whether the legacy claimed by the appellant, and mentioned in the will of John I. Becker, deceased, was an equitable charge and lien primarily on the lands of the respondents, as purchasers claiming title under the will? *Dodge agt. Manning and others*, 794

2. Whether the real estate, under a mortgage foreclosure, was purchased *subject* to the payment of the legacies, notice thereof having been given at the sale—and, therefore, should be charged in exoneration of the personal estate *id*

3. Whether it was necessary for the appellant, the complainant, to aver in the bill, and prove an insufficiency of personal property to pay the legacies; and, if such averment was necessary, whether the defendants should not have demurred? *id*

4. Whether a *mortgagee* has *constructive notice* that legacies are a charge on the premises mortgaged by the devisee, being obliged to make title through the will of the testator? *id*

5. Whether, although the devisee, one of the defendants, by accepting the devise, was personally liable for the complainant's legacy, the lands were nevertheless charged, and, under the circumstances of the equities between the defendants, were first liable? *id*

6. Whether there was any personal estate in the hands of the devisee applicable to the payment of legacies? And whether the answers aver any? *id*

7. Whether the legacy of the complainant had been paid? *id*

Decisions.

1. See *Dodge* agt. *Manning*, 817

LEVY

See *ABATEMENT—Questions* 1, 2—*Decisions*—1, 2, 3.

LIEN.

See *PLEADINGS—Questions* 1, 2, 3—*Decisions* 1, 2, 3, 4.

Decisions.

1. Every bailee for hire, who, by his labor and skill, has imparted an additional value to the goods, has a lien upon the property for his reasonable charges, whether there be an agreement to pay a stipulated price, or only an implied contract to pay a reasonable price, unless there be a future time or mode of payment fixed. *Curtis* agt. *Jones*, 149

See *EXECUTORS AND ADMINISTRATORS—Questions* 2, 3—*Decisions* 1–11.

ABATEMENT—Questions 1, 2—*Decisions* 1, 2, 3.

LEGACIES AND LEGATEES—Questions 1–7—*Decisions* 1.

LIFE INSURANCE.

See *MARRIED WOMAN—Questions* 1, 2—*Decisions* 1.

LIMITATION OF ACTIONS.

Questions.

1. Whether an action brought against a stockholder of the Rossie Galena Company, individually, under the act incorporating that company, (*Stat. of 1837, p. 445*), for goods, wares, &c., delivered to the company, is an action founded upon the statute, and in the nature of a forfeiture, or upon the common law liability of the stockholder,

as upon contract. *Corning & Horner* agt. *M^cCullough*, 126

2. Whether the statute of limitations—three or six years—applies in such a suit? *id*

Decisions.

1. The court decided that the suit was not an action upon a statute for a forfeiture or cause, the benefit and suit whereof is limited to the party aggrieved, therefore not barred by the short statute (three years) of limitation; that six years' statute of limitations applied in such suits. *Corning & Horner* agt. *M^cCullough*, 136

See *ASSIGNMENT FOR BENEFIT OF CREDITORS—Questions* 3—*Decisions* 1.

LOTTERIES.

See *INDICTMENT—Questions* 1, 2, 3—*Decisions* 1, 2, 3.

M

MARRIED WOMAN

Questions.

1. Whether a married woman, with the consent of her husband, could by will dispose of the proceeds of a policy of insurance, procured by her under the act of 1840, on the life of her husband, for her separate use? *Moehring* agt. *Thayer*, pub. adm'r., &c. 502

2. Whether such a will can be propounded, admitted to probate, and proved as a last will and testament? *id*

Decisions.

1. On the ground "that the surrogate had no jurisdiction, under the statute, to take proof of the will of a married woman." Whether a court of equity could give any effect to the paper, was not decided. (No written opinion.) *Moehring* agt. *Thayer*, pub. adm'r., &c. 509

See *TRUST DEEDS—Questions* 1–4—*Decisions* 1.

MORTGAGE, FORECLOSURE AND SALE.

Questions.

1. Whether a mortgage sale made in pursuance of a decree of foreclosure, which described the greater part of the premises situated in the *wrong county*, where the sale was made, was *inoperative and void*? *Van Geisen* agt. *Fuller*, 240

2. Whether the purchaser, under a mortgage sale, who has received his deed, can bring ejectment before *confirmation of the sale*? And whether the doctrine of *relation* applies, after confirmation? *id*

Decisions.

1. It was *held*, by the supreme court, (COWEN, J., delivering the opinion,) that the master's sale passed the title presently; and the objection that the suit was prematurely brought, could not avail. Besides, all question upon that matter was removed by the doctrine of relation. The confirmation of the sale related to the date of the deed; thus overreaching the claim of a mere intruder into the premises. *Van Geisen* agt. *Fuller*, 246

2. As to the rights of the defendant, *held*, that Schermerhorn, (under whom he claimed to hold by contract,) and all other proper parties having been brought into court, and the defendant being a mere naked possessor, although in before the bill was filed, had taken no title by which he stood connected in any way with the mortgagor, or those claiming under him; no right of his was overreached, because he had none. *id*

3. *Held*, that had the sale been made under a power contained in the mortgage, the auction must have been in the counties respectively where the lands lay. But the provision in the charter did not take away the jurisdiction of the court of chancery. Even if the provision be regarded as mandatory and restrictive upon the court, it was but directory; and the most that could have been done, by way of impeaching the decree, was to appeal. The proceeding could not be inquired into collaterally. The decree binds till it is reversed. The charter might be satisfied, by con-

fining it to a summary foreclosure, by advertisement. *id*

4. The master governed himself by the location appearing on the face of the decree, in which he was right. The defendants in the chancery suit, were the only persons who could complain; and they were then precluded. A mere stranger could not raise the question collaterally. *id*

5. Judge COWEN said the case might be stated in this way: "The decree misjudges on a material fact, the location of the land; and a stranger claims to contradict it by a special verdict." *id*

See LEGACIES AND LEGATEES—*Questions* 1-7—*Decisions* 1.

MULTIFARIOUSNESS.

See PLEADINGS—*Questions* 5-10—*Decisions* 5.

N

NON-IMPRISONMENT ACT 1831.

See ASSIGNMENT FOR BENEFIT OF CREDITORS—*Questions* 4, 5, 6—*Decisions* 2, 3.

NON-SUIT.

See EVIDENCE—*Questions* 7-17—*Decisions* 4-11.

REPLEVIN—*Questions* 3, 4.

NUISANCE

Questions.

1. Whether the declaration in this case, was for the old assize of *nuisance*, or in an action on the *case* for nuisance? *Cornes* agt. *Harris*, 595

2. Whether an action on the *case*, for nuisance, can be commenced by *original writ*? And if not, whether, when so commenced, the defendant, by pleading to the declaration in an action

on the case, waives the defective manner in which he was brought into court? *id*

Decisions.

1. *BROWSON, J.*, delivered the opinion of the court, and *held*, that it was an action on the *case*. That it was not necessary to mention the form of the action in the commencement of the declaration; that was determined by the *matter* contained in the declaration—not by the name which the plaintiff might give it. *Cornes* agt. *Harris*, 603

2. As to the *writ*, it was of no importance how the defendant came into court. It was enough, that he appeared and pleaded to the declaration, in an action of which the court had jurisdiction. He could not afterward object, that he was not regularly brought into court, or that the declaration varied from the process. *id*

①

OBJECTIONS TO EVIDENCE.

See EVIDENCE.
WITNESS.

P

PARTIES.

Questions.

1. Whether an action should be brought in the name of the *sheriff*, or his *deputy*, to recover back an excess of a bill of costs, paid by the deputy, to settle a suit against the sheriff, where the deputy declared that he paid it on his own account? *Britton & Hadley* agt. *Frink*, 4

2. Whether suit was properly brought against the *partners*, to recover an excess of costs, where one only appeared as attorney, and the money was received, and receipt given by him? *id*

Decisions.

1. A suit was properly brought by the sheriff, for an excess of costs, paid by his deputy, although the deputy stated, when he paid the bill of costs,

“that he should pay it himself, and bear the loss himself.” It was a payment to and for the use of the sheriff, which discharged the suit against him; and was subsequently ratified by him in bringing the suit against the attorney. The sheriff was the only person who could disavow the acts of his deputy. *Britton & Hadley* agt. *Frink*, 10

See PRINCIPAL AND AGENT—*Questions* 1, 2—*Decisions* 1, 2.

EXECUTORS AND ADMINISTRATORS—*Questions* 1—*Decisions* 1–11.

PLEADINGS—*Questions* 10—*Decisions* 5.

Questions.

3. Whether a bill, filed by *two creditors*, sureties on custom-house bonds, claiming, for that reason, priority above all other creditors, against a defendant, *assignee in trust* of an insolvent firm—the assignment being made to indemnify the assignee, as surety for the firm, also on custom-house bonds, was defective for *want of parties*. *Bouchaud, ex'r*, agt. *Dias & Furman*, 509

See ASSIGNMENT FOR BENEFIT OF CREDITORS—*Questions* 2—*Decisions* 1.

PENALTIES AND FORFEITURES.

See LIMITATION OF ACTIONS—*Questions* 1, 2—*Decisions* 1.

PERFORMANCE.

See CONTRACT—*Questions* 3, 4.
SPECIFIC PERFORMANCE—*Questions* 1, 2, 3—*Decisions* 1, 2, 3.

PLEADINGS.

Questions.

The defendant, in an action of replevin, *avowed* the detention of the property, (sash doors,) under his right of lien for the manufacture thereof. The plaintiff pleaded, to the avowry, that the work was done under, and in pursuance of an agreement theretofore

made between the parties, whereby it was, among other things, agreed that the defendant should manufacture the doors for a certain price specified in the agreement, a part thereof to be paid to the defendant as the work progressed, and the remaining part to be paid after the doors should be completed and hung; and an allegation that, at the time of the detention, the plaintiff had paid the defendant all that had then become due to him,

1. Whether the plea to the avowry was sufficient, in not setting forth, with reasonable certainty, the terms, and showing what the particulars of the agreement were under which the doors were made, including, as most essential, the price, and time of payment? *Curtis* agt. *Jones*, 137

2. Whether the plea contained, in substance, a bar to the lien set up by the defendant; and, not having been demurred to upon the ground that the price and time of payment were not stated; the ground on which the supreme court decided the cause and reversed the judgment, was in that respect to be considered as upon a *general demurrer*? *id*

3. Whether, where the jury having passed upon the question of fact, and found the doors the property of the plaintiff, it did not involve all the matters in the demurrer, and contain all the merits, so that judgment should have been for the plaintiff upon the whole record? *id*

Decisions.

1. Whatever is alleged in pleading, must be alleged with reasonable certainty; and that he who pleads a contract must *set it out, if he be a party to it*. *Held*, that the plaintiff's plea to the avowry was bad, because the particulars of the agreement set up in it should have been stated, so that the court could determine whether the right of lien existed at the time of the detention; and, also, in order to apprise the defendant of what was meant to be proved, so that he might answer or traverse it. *Curtis* agt. *Jones*, 149

2 If one of several pleas of a defendant, which goes to the whole cause of action, is sustained, it constitutes a bar to the recovery of the plaintiff, not-

withstanding some other issues may have been found in favor of the plaintiff. *id*

3. *Bronson, J., held*, that the avowry alleging that at the time when, &c., the plaintiff was largely indebted to the defendant for his work and labor upon the doors; and the plaintiff pleading matters inconsistent with this material allegation, without traversing it, was bad pleading. *id*

4. The plea was also bad, for the reasons assigned by the supreme court. Where one good bar is found or adjudged in favor of the defendant, it is a matter of no consequence what becomes of the other issues; he is entitled to judgment on the whole record. *id*

See PRINCIPAL AND AGENT—Questions 1, 2—Decisions 1, 2.
EXCEPTIONS—Questions 1, 2—Decisions 1, 2.

Questions.

4. Whether a declaration in a justices' court, in the following form, is good in form or substance? to-wit: "The plaintiffs appeared and declared against the defendant in an action of trespass, and for breaking in and destroying, and taking from the premises of plaintiffs certain boards and other fencing stuffs, and converted the same to his own use." *M'Keon* agt. *Graves & Best*, 345

See JUSTICES' COURTS—Decisions 4, 5, 6, 7, 8.

INDICTMENT—Questions 1, 2, 3—Decisions 1, 2, 3.

WRIT OF ERROR—Questions 1—Decisions 1.

5. Whether the original bill of complaint, filed in the court below by Thomas M'Cosker, was *multifarious* by praying that the will of John M'Cosker, the younger, be *set aside*, because of incompetency and undue influence; and, also, praying that if said will be held valid, that *partition* be made of the real estate? *Brady* agt. *M'Cosker*, 480

6. If jurisdiction in equity can be entertained in any case of a bill of complaint, filed by an *heir at law*, to set aside the will of his ancestor, for alleged incompetency and undue influ-

ence, whether it must not only be where there not only exists a legal impediment to his obtaining redress at law, but where such impediment *has not been created by his act, or that of his ancestor?* *id*

7. Whether any *impediment* existed to the right of Thomas M'Cosker, to bring ejectment, such as would create jurisdiction in equity over this case? *id*

8. Whether John Andrew M'Cosker, the respondent, who filed the bill in this case, in the nature of a bill of revivor and supplement, being *devisee* of his father, Thomas M'Cosker, (who filed the original bill,) and a *defendant* in the original suit, could revive it, until a decree had been made, giving him an interest in its continuance? *id*

9. Whether John Andrew M'Cosker was prevented, by any legal impediment, from bringing a suit in ejectment? *id*

10. Whether James T. Brady was improperly made a party to this suit? *id*

Decisions.

5. *See Brady* agt. *M'Cosker*, 500

Questions.

11. Whether the *declaration* in this case, was for the old assize of *nuisance*, or in an action on the *case* for nuisance? *Cornes* agt. *Harris*, 595

12. Whether an action on the case for nuisance, can be commenced by *original writ*? And, if not, whether, when so commenced, the defendant, by pleading to the declaration in an action on the case, waives the defective manner in which he was brought into court? *id*

See NUISANCE—*Decisions* 1, 2–13.

13. The only question in this case was, whether the plaintiff's *declaration* was bad in *substance*, as well as in form? *Rowland* agt. *Fuller*, 629

Decisions.

6. BRONSON, J., *held* that the declaration was bad in *substance*, as well as in form. If the action was called *trespass*, the plaintiff had not the possession in fact, and could not maintain the

common law action of trespass. *Rowland* agt. *Fuller*, 638

7. If it was called an action on the case, it was bad, because it alleges an injury to the property generally, not limiting to an injury done to plaintiff's reversionary estate and interest in the property, nor avers that there was any injury to that estate or interest. *id*

PLEDGE.

Questions.

1. Where personal property is *pledged* for debt, and in the possession of the *pledgee*, and the sheriff having an execution against the *pledgor*, whether the sheriff may, by virtue thereof, take the property out of the hands of the *pledgee* into his own possession, and *remove* it, and sell the right and interest of the *pledgor* therein? *Stief* agt. *Hart*, 181

2. Whether, if *trespass* would lie against the general owner for interference with the *pledgee's* possessory title, it would lie against the sheriff for the same cause? *id*

Decisions.

1. *Held* that the 20th section of the statute, (2 R. S. 366,) authorizes the sale of the "right and interest" of the *pledgor* in goods and chattels, on execution against him. And the 23d section of the same statute declares, that no *personal property* shall be exposed for sale, unless the same be *present and within the view* of those attending the sale. And that the term "*personal property*," in the 23d section, applied to and included the term "*right and interest*," mentioned in the 20th section, as regards the regulation and sale of pledged goods. *Stief* agt. *Hart*, 186

2. Consequently, the right of the sheriff to *take* and *hold* the goods preparatory to a sale of such right and interest, arises by *necessary implication*. Whenever a power is given by statute, everything necessary to making it effectual, or requisite to attain the end, is implied. *id*

POWER AND AUTHORITY.

See PROPERTY—*Decisions* 2.

Questions.

1. Whether the *power of attorney* executed by Charles Green, a judgment creditor claiming surplus funds in this cause, to his brother, Walter C. Green, was, in form and terms, sufficient to authorize the latter to make an *assignment* of the judgment of Charles Green, or to make an accord and satisfaction as to the judgment, and the claims of Charles Green on the surplus funds in court? *Howland* agt. *Ayres and others*, 283

Decisions.

1. Where an assignment of a judgment was executed by "C. G. [L. S.] by his attorney, W. C. G.;" and it appeared that W. C. G. had a general power of attorney from C. G., which was claimed by C. G. to have been in fact restricted to a particular business, of which this assignment was not within its scope—*held*, that by the manner of executing the assignment, the constituent and his attorney were estopped from saying that the assignment was not made by *virtue of the power*. *Howland* agt. *Ayres and others*, 303

2. A negotiation and agreement by the attorney to receive part payment or accord and satisfaction for a judgment belonging to his constituent under such a power, and the actual receipt of such payment—*held*, valid and binding on the constituent. *id*

PRINCIPAL AND AGENT.

Questions.

1. Whether a *charter party*, drawn J. D. C. of the first part, and *M. P.*, of the city of New-York, (*agent* for J. C. and M. S., of Newbern,) of the second part, and naming the *parties* of the second part, throughout the covenants, and *signed and sealed* "*M. P.—agent L. S.*" is the deed of, and binds *M. P.*, the agent, *personally*? *Platt* agt. *Cathell*, 230

2. Where a declaration counts on a deed of charter party, *inter partes*, sealed with the seal of the defendant,

as party thereto, but the defendant described throughout as *agent*, and signed as agent, of which deed *profert* is made. Whether it is competent for the defendant, in a plea, not traversing the execution of the deed, as alleged, to *aver* a different effect or description of party in the deed, to wit: that he was agent, and executed in that character? *id*

Decisions.

1. It was *held* by the supreme court, BEARDSLEY, J., delivering the opinion, that it was no answer to the cause of action to say, as the plea demurred to did, that the Stevensons made and executed the said charter party, by the defendant, as their agent. The defendant being named in the covenant as the party of the second part, and having duly executed it by affixing his own seal, he was personally bound, whatever his authority or his intention might have been. *Platt* agt. *Cathell*, 240

2. As to the exceptions taken at the trial, they could not be sustained, because, in law, the charter party given in evidence, was the defendant's deed, and not that of the Stevensons. The Stevensons were not bound by it, but the defendant was. *id*

See POWER AND AUTHORITY—*Questions* 1—*Decisions* 1, 2.

SHERIFF—*Questions* 1-6.

PROPERTY.

Questions.

1. Whether *growing grass* upon land leased by a tenant of the owner, can be mortgaged by the tenant in possession, as *personal property*? In other words, is it real or personal property, and would it go to the *executor*, or the *heir*? *Jencks* agt. *Smith*, 150

See CHATTEL MORTGAGE—*Questions* 1.

2. Where personal property is *pledged* for debt, and in the possession of the *pledgee*, and the sheriff having an execution against the *pledgor*, whether the sheriff may, by virtue thereof, take the property out of the hands of the *pledgee* into his own possession, and *remove* it, and sell the right and interest of the *pledgor* therein? *Stief* agt. *Hart*, 131

3. Whether, if *trespass* would lie against the general owner for interference with the pledgee's possessory title, it would lie against the sheriff for the same cause? *id*

Decisions.

1. *Held*, that the 20th section of the statute, (2 R. S. 366,) authorizes the sale of the "right and interest" of the *pledgor* in goods and chattels, on execution against him. And the 23d section of the same statute declares, that no *personal property* shall be exposed for sale, unless the same be *present* and *within the view* of those attending the sale. And that the term "*personal property*," in the 23d section, applied to and included the term "*right and interest*," mentioned in the 20th section, as regards the regulation and sale of pledged goods. *Stief* agt. *Hart*, 186

2. Consequently, the right of the sheriff to *take* and *hold* the goods preparatory to a sale of such right and interest, arises by *necessary implication*. Whenever a power is given by statute, everything necessary to making it effectual, or requisite to attain the end, is implied. *id*

See EXECUTORS AND ADMINISTRATORS—*Questions* 2, 3—*Decisions* 1-11.

WILL—*Questions* 1, 2, 3—*Decisions* 1, 2, 3.

EXEMPTION—*Questions* 1, 2—*Decisions* 1, 2.

EVIDENCE—*Questions* 23-27—*Decisions* 28-32.

TROVER AND CONVERSION—*Questions* 4-8—*Decisions* 3, 4.

FREIGHT—*Questions* 1, 2—*Decisions* 1, 2, 3.

PROTEST.

See BILLS OF EXCHANGE AND PROMISSORY NOTES—*Questions* 3-8—*Decisions* 4.

PUBLICATION.

See ASSESSORS AND ASSESSMENTS—*Questions* 4—*Decisions* 7.

R

RELEASE.

See WILL—*Questions* 3.
SHERIFF—*Questions* 5, 6.

REPLEVIN.

See PLEADINGS—*Questions* 1, 2, 3.

Questions.

1. Whether, on the death of the plaintiff pending an action of *replevin*, the action *abates*, and cannot be revived? *Burckle & Gebhard, Ex'rs*, agt. *Luce*. 330

2. Where property had been levied upon by a sheriff, by virtue of an execution, and by an action of *replevin* had been taken from his possession, whether, upon the death of the plaintiff pending the action of *replevin*, the sheriff had a right to *retake* the property and sell it on the execution. *id*

3. Whether *replevin* for wrongful *taking* would lie where the property, nine casks horn-tips, purchased and paid for by plaintiff, with a request by defendants to take them away, which was objected to by plaintiff until counted; and, during their continuance in the store of defendants, while plaintiff was counting the same, he was forbidden by defendants from taking them away? In other words, was the evidence in the case sufficient to sustain the action of *replevin* in the *cepit*? *Hymann* agt. *Cook and others*, 419

4. Whether, in a non-suit in *replevin*, on the ground that the proof did not show a wrongful *taking*, but, at most, only a wrongful detention; and, the defendants having *once elected* to take an *assessment of damages* under the statute, they could afterward, and before the jury were discharged, waive the assessment, and take judgment for a *return of the property*? *id*

Decisions.

1. See *Hymann* agt. *Cook and others*, 447

RESERVATION.

Questions.

1. Whether the *reservation* in the lease referred to (in the case) was confined to the use of the stream for mills erected, &c., for *mining* purposes only? *French, jr. agt. Carhart,* 40

2. Whether the reservation of "all creeks, kills, streams and runs of water," in the lease, was *absolute* for all purposes? *id*

3. Whether the conveyance and reservations bounded the party to the edge or center of the stream? *id*

Decisions.

1. Where a lease contained the exception of "*all mines and minerals*," which was immediately followed by the exception of "all creeks, kills, runs and streams of water;" and, so much ground as the lessor, &c., might think requisite and appropriate for the erection of works and buildings, for the convenient *working of the said mines*: also, reserving wood and timber for the same purpose, *held*, that the reservation of the stream was for all purposes, and not for mining purposes merely. And, also, that the reservation was not merely of the natural bed of the stream, but of a right to use the stream in the same manner, and to set back the water to the same extent as when the grant was made. *French, jr. agt. Carhart,* 51

S

SALES FOR TAXES AND ASSESSMENTS.

See ASSESSORS AND ASSESSMENTS—*Questions 1, 2, 3, 4—Decisions 1-7.*

SHERIFF.

See PARTIES—*Questions 1, 2—Decisions 1.*

COSTS—*Questions 1.*

PROPERTY—*Questions 2, 3—Decisions 1, 2.*

ABATEMENT—*Questions 1, 2—Decisions 1, 2, 3.*

Questions.

1. Whether a plaintiff can maintain an action against the sheriff, for an *escape* of a prisoner confined to the jail limits, if the escape be procured by the fraudulent contrivances and devices of the person employed by the plaintiff to commence the suit, without the authority, knowledge or assent of the plaintiff, of such fraudulent acts? *Dexter & Veazie agt. Adams,* 771

2. Whether the plaintiff can adopt such an escape, procured for his benefit, and repudiate the means by which it was procured; or, whether he must not adopt all or none of the unauthorized acts of the person acting as his agent, and for his benefit? *id*

3. Whether fraud was committed in this case upon the prisoner, to induce him to leave the limits? *id*

4. Whether it should not have been left to the jury to say that, if they believed that the prisoner was aware, at the time he went where he did, he forfeited his limit bond, and made the sheriff liable for an escape, whether the message to decoy him off was true or false, and, with such knowledge, went deliberately off the limits, that then the sheriff was liable, though the message sent to get him off was false? *id*

5. Whether the court erred in admitting the testimony of the prisoner, after a release by the sheriff; or, whether such release divested him of his interest in the event of the suit? *id*

6. Where it was alleged that an objection was not taken at the circuit, had it have been, it might have been obviated, whether this court would listen to it? *id*

Decisions.

1. See *Dexter & Veazie agt. Adams,* 793

SPECIFIC PERFORMANCE.

Questions.

1. Whether, on a bill by Slocum for the *specific performance* of a written agreement, under seal, to convey a farm of land by Closson, one of the respond-

ents, to him, there was proof of a prior valid contract between Closson and Mosher, to sell the farm to Mosher? Or, whether the latter contract amounted to anything more than a *negotiation*—a *proposal* for a sale merely? *Slocum* agt. *Closson & Mosher*, 705

2. Whether the written agreement to Slocum was obtained from Closson, by unfair and deceptive representations, and with a knowledge, and in violation of a previous parol agreement or understanding, between Closson and Mosher, that Mosher was to have the farm? *id*

3. Whether Mosher, having purchased and taken a deed of the premises of Closson, with knowledge of the previous agreement between Slocum and Closson, was affected by that knowledge, so that his deed should be set aside, or he compelled to join with Closson in the specific performance? *id*

Decisions.

1. The opinion of the vice-chancellor, WILLARD, is the only one which discusses the merits of this case. And, he *held*, that the party who seeks the aid of a court of equity, in enforcing a specific performance of a contract, holds the affirmative, and must make out a case entitling him to the relief sought. And, must show,

1st. That the legal remedy is inadequate; and that, without a specific performance, injustice will be done, or irreparable injury produced. And,

2d. That the contract is fair, just, and reasonable, equal in all its parts, founded on an adequate consideration, and free from fraud, misrepresentation or surprise. *Slocum* agt. *Closson & Mosher*, 758

2. *Held*, that in this case, the proof showed—allowing, on the score of credibility, Fish to be preferred to Wm. B. Slocum—that it was probable, that Wm. B. Slocum induced Closson to believe that Mosher did not want the place; that he had treated him unfairly, by letting it go to ruin with a view to get it for nothing; that Mosher wanted to cheat Closson out of the place; and that he then excited a hostile spirit in the bosom of Closson towards Mosher. That these assertions had a controlling influence on the mind of Closson, and induced him to make the contract with

plaintiff. That they were alleged to be false, and no attempt had been made to show that they were true. *id*

3. The complainant, in fact, had no equity against either defendant. *id*

STATUTE OF FRAUDS.

See AGREEMENT—Decisions 1.

Questions.

1. Whether a *parol agreement*, made on the 14th March, 1842, by which the plaintiff let the defendant certain rooms in her dwelling-house, for board and lodging of the defendant and his wife, for a stipulated sum to be paid quarterly, *for the term of one year from the 1st of May, 1842*, was void by the statute of frauds—not being in writing? *Halsted* agt. *Spencer*, 319

See AGREEMENT—Decisions 1.

2. Whether the evidence in this case showed a *sale and delivery* of a pile of lumber? *Shindler* agt. *Houston*, 680

3. Whether the agreement of the parties was within the statute of frauds—there being something to be done to complete a sale and delivery? *id*

Decisions.

1. GARDINER, BRONSON and WRIGHT, judges, delivered written opinions, in which they substantially *held*—That the statute of fraudulent conveyances and contracts pronounced this agreement, when made, void, unless the buyer should “accept and receive some part of the goods.” The language is unequivocal, and demands the action of both parties; for acceptance implies delivery, and there can be no complete delivery without acceptance. The defendant, however, said nothing, and did nothing subsequent to the agreement, except through his agent, to repudiate the contract. There was consequently no evidence of delivery. *Shindler* agt. *Houston*, 691

2. Mere words of a contract, unaccompanied by any act, cannot amount to a delivery. A writing must be made—part of the purchase money must be paid, or the buyer must accept and re-

ceive part of the goods. Here there was no delivery, either actual or symbolic. *id*

3. There must not only be a delivery by the seller, but an ultimate acceptance of the *possession* of the goods by the buyer. And this delivery and acceptance can only be evinced by unequivocal acts, independent of the proof of the contract. *id*

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS—*Questions*.

ASSIGNMENT FOR BENEFIT OF CREDITORS—*Questions* 3—*Decisions* 1.

STATUTES.

See PLEDGE

ASSESSORS AND ASSESSMENTS—*Questions* 1, 2, 3, 4—*Decisions* 1-7.

MORTGAGE, FORECLOSURE AND SALE—*Decisions* 3, 4.

EXEMPTION—*Questions* 1, 2—*Decisions*—1, 2.

Questions.

1. Whether advertising in this state a lottery, and the sale of lottery tickets, to be drawn in another state, and authorized in the latter state, are within the prohibitions of our constitution and statute, (1 R. S. 665,) which forbids the formation of any lottery within this state? *Charles, imp'd, &c. agt. The People,* 359

2. Whether it is necessary to aver, expressly, in an indictment, that the lottery is not authorized by law? *id*

3. Whether an indictment is defective, in not averring for what purpose the lottery in question is set on foot, where it sets forth in *extenso* the advertisement, by which it is apparent that the prizes consist of money? *id*

See INDICTMENT—*Decisions* 1, 2, 3.

JURISDICTION—*Questions* 2—*Decisions* 1, 2, 3, 4.

STREETS IN THE CITY OF NEW-YORK.

See ASSESSORS AND ASSESSMENTS—*Questions* 1, 2, 3, 4—*Decisions* 1-7

SURETY.

See USURY—*Questions* 3, 4, 5—*Decisions* 2.

SURPLUS FUNDS.

See POWER AND AUTHORITY—*Questions* 1—*Decisions* 1, 2.

USURY—*Questions* 1, 2—*Decisions* 1.

SURROGATE.

See WILL—*Questions* 5—*Decisions* 4.

EXECUTORS AND ADMINISTRATORS—*Questions* 4, 5, 6—*Decisions* 12, 13.

T

TESTIMONY.

See EVIDENCE.

WITNESS.

TROVER—*Questions* 2, 3.

TITLE.

Questions.

1. Whether the *reservation* in the lease referred to, (in the case,) was confined to the use of the stream for mills erected, &c., for *mining* purposes only? *French, jr. agt. Carhart,* 40

2. Whether the reservation of "all creeks, kills, streams and runs of water," in the lease, was *absolute for all purposes*? *id*

3. Whether the conveyance and reservations bounded the party to the edge or center of the stream? *id*

4. Whether the circuit judge erred in refusing to submit to the jury a question of fact, as to the true location of the deed under which title was derived? *id*

Decisions.

1. Where a lease contained the exception of "*all mines and minerals*," which was immediately followed by the exception of "all creeks, kills, runs and streams of water;" and so much ground as the lessor, &c., might think requisite and appropriate for the erection of works and buildings for the convenient *working of the said mines*; also, reserving wood and timber for the same purpose.

Held, where it appeared the creek was used for *milling* purposes, that the reservation of the *stream* was for *all* purposes, and not for mining purposes merely. And, also, that the reservation was not merely of the natural bed of the stream, but of a right to use the stream in the same manner, and to set back the water to the same extent as when the grant was made. *French, jr. agt. Carhart*, 51

Questions.

5. As to the true *location* (from the evidence) of the northerly boundary line of the Kempe tract of land, and the southerly boundary of the Wolf tract adjoining, situated in the town of Haverstraw, Rockland County, adjoining the Hudson river. *Wood, ex'r. agt. Weiant and others*, 155

See PROPERTY—*Questions* 1, 2, 3.

MORTGAGE, FORECLOSURE AND SALE—*Questions* 1, 2.

CONTRACT—*Questions* 5, 6—*Decisions* 1, 2.

REPLEVIN—*Questions* 3, 4—*Decisions* 1.

TRUST DEEDS—*Questions* 1, 2, 3, 4—*Decisions* 1.

DOWER—*Questions* 1, 2, 3, 4—*Decisions* 1, 2, 3, 4.

LEGACIES AND LEGATEES—*Questions* 1-7—*Decisions* 1.

TRADE MARK.

Questions.

1. Whether a "*trade mark*," which has become known, is a species of

property which will be protected by the court of chancery? *Partridge agt. Menck and others*, 547

2. Whether any unauthorized use of such trade mark, which shall have the effect to take from the proprietor thereof, the lawful advantage which he might derive from the same, is an infringement of the right of such proprietor, which will warrant the interference of the court? *id*

3. Whether it is the same in principle, whether the trade mark be used *without change*, or, whether it be *imitated*, or used in part with some colorable difference, if it is still calculated to mislead the public? *id*

4. Whether Partridge, as purchaser from and successor of A. Golsh, had an exclusive right to the use of the imprint of the "*bee-hive*," and the words "*A. Golsh*," which composed the material parts of the label and designation of the "*Golsh Matches*?" *id*

5. Whether the respondents, by the similarity of their label, with that of A. Golsh, were deceiving the public, by selling matches manufactured by them as and for those manufactured by the appellant, and thereby injuring his business? *id*

Decisions.

1. GARDINER, J., *held*, that the bill was defective for want of *equity*, because the complainant, by his own showing, claimed the exclusive right to impose upon the public matches made by himself, as those manufactured by A. Golsh. *Partridge agt. Menck and others*, 561

2. The privilege of deceiving the public for their own benefit, was not a legitimate subject of commerce; and, therefore, it made no difference, that the complainant had *purchased* the right to use the name of Golsh. He must come with pure hands when asking for equity. *id*

3. WRIGHT, J., *held*, that it was then unnecessary to inquire whether, under the peculiar circumstances of this case, a court of equity would be bound to protect the appellant, as the *dissimilarity in the labels* was a sufficient

ground on which to determine the case
in favor of the respondents. *id*

TRESPASS.

See PROPERTY—Questions 2, 3—Decisions 1, 2.

JUSTICES' COURTS—Questions 1,
2—Decisions 2-8.

TROVER AND CONVERSION.

Questions.

1. Whether a question of *fact* was made out sufficient to establish a *conversion*? *Moak* agt. *Poland*, 11

See EVIDENCE—Decisions 3.

2. Whether the rule of damages, in an action of *trover*, is the value of the goods at the time and place of conversion? *Caffe* agt. *Bertrand*, 224

3. Where there is conflicting testimony upon the subject of damages, in such an action, whether the rule of damages is a question of law, not to be submitted to the jury? *id*

Decisions.

1. The principal point established in this case, seems to be, that the value of foreign goods, in an action of *trover*, is to be ascertained by the custom house appraisal of them here, if made near the time of conversion. *Caffe* agt. *Bertrand*, 230

Questions.

4. Whether, in an action of *trover*, brought by a constable, against a defendant, who claimed to take the property by virtue of an attachment and levy, the constable could recover the full value of the property, or only the amount of the execution in his hands, and interest thereon? *Mattison* agt. *Baucus*, 639

5. Whether, in an action of *trover*, by a constable, claiming the property by virtue of a judgment, execution and levy, the defendant could question the validity or regularity of the judgment

and execution, before showing some right to the property in question? *id*

6. Whether proof of what plaintiff said when he made the levy—having been called as a witness to prove the loss of the execution delivered to him—was properly admitted? *id*

7. Where the plaintiff, to prove a conversion, showed that the defendant directed one Allen to sell the goods—whether the defendant should have been permitted to show, in the same conversation, he said that the goods had been seized by an attachment in his favor, under which he had obtained judgment and execution? *id*

8. Where a chattel mortgage, containing a condition that the mortgagor should at all times permit the mortgagee, his executors, &c., to have and possess, occupy and enjoy the property mortgaged, upon demand by him or them—whether, where the mortgagee having possession of the property under the mortgage, the debt secured thereby not being due, the mortgagor has such an interest in the equity of redemption as can be sold on execution? *id*

Decisions.

2. GARDINER, J., *held*, that the interest of Foster, the mortgagor and judgment debtor, was a right of redemption *only*—a mere chose in action; not the subject of levy and sale upon execution, unless united with a right to the possession for a definite period. (3 *Wend.* 500.) By the express terms of the mortgage, the mortgagee “was at all times, upon demand, entitled to possess, occupy and enjoy” the property mortgaged, and the case showed that he had taken and held possession at the time of the levy.

The levy, therefore, by the plaintiff, was wholly inoperative. It gave no lien upon the property, and consequently no right to maintain the action. *Mattison* agt. *Baucus*, 658

TRUST DEEDS.

Questions.

1. Whether there can be a *bona fide* purchaser, from a person who is entitled to property by deed of gift, or a

voluntary settlement; in case it afterwards turns out that the grantor was indebted to such an extent, that the conveyance or voluntary settlement would operate as a fraud upon his creditors? *Fraser and others* agt. *Western and others*, 448

2. Whether the mere fact, that the purchaser from the holder of such a title has notice that it was not founded upon a *pecuniary consideration*, but was voluntary, is sufficient to make it his duty, at his peril, to *inquire* whether the title of his grantor was not fraudulent as against creditors? *id*

3. Whether, under the evidence in this case, *Western*, one of the respondents, who purchased under a *voluntary trust deed*, was acquainted with the circumstances of the *grantor* at the time the trust deed was executed, so as to make it his duty to *inquire* whether the deed of trust was not intended as a fraud upon the creditors of the grantor? *id*

4. Whether *Western* acquired the *legal title* to the premises in question, so as to entitle him to protection as a *bona fide* purchaser without notice? *id*

Decisions.

1. See *Fraser and others* agt. *Western and others*, 479

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UNITED STATES.

See ASSIGNMENT FOR BENEFIT OF CREDITORS—*Questions* 1, 2, 3—*Decisions* 1.

USURY.

See WITNESS—*Questions* 2, 3, 4—*Decisions* 1, 2.

Questions.

1. Whether the evidence introduced before the master, on a reference to ascertain claims to a surplus fund in court, proved *usury* as to a judgment of one of the claimants? *The Eagle Fire Co.* agt. *Flanagan and others*, 303

2. Whether the defence of *usury* can be set up by one claimant against another, where the *usury* is charged as between one of the claimants and the judgment debtor, whose surplus funds are paid into court? *id*

Decisions.

1. In the absence of any written opinion or grounds of decision in this case, either by the vice-chancellor, the chancellor, or this court, it is fair to presume, that the grounds of the decision expressed by the vice-chancellor and the chancellor, to the respondent's attorney, at the time such decisions were made, were the grounds adopted by this court, to-wit: that no *usury* was proved against the respondent, *Duff. The Eagle Fire Co.* agt. *Flanagan and others*, 315

Questions.

3. Where complainants—sureties upon a promissory note—in an action at law against them, the payor having set up the defence of *usury*, which complainants were unable to prove on the trial, by reason of their principal witness, the payee of the note, who was not plaintiff on record, swearing that he was *plaintiff in interest*, (complainants not having verified their notice under the *usury* act of 1837,) and excluded as a witness in chief on that ground; and, thereupon, judgment passed against the complainants,—whether they could, after such a judgment, be relieved in equity, by alleging in their bill, and setting forth, as the ground of their complaint, the *usury* and these facts? *Vilas & Bacon* agt. *Jones & Percy*, 759

4. Whether the *usurious* agreements, executed and executory, for the extension of the time of payment of the note given by the payee to the payor, the principal debtor, without the consent of the complainants, as sureties, discharged them, and entitled them to the relief sought by the bill? *id*

5. Whether *sureties* on a note are to be deemed "*borrowers*" within the equity of the act of 1837, as far as it regards the remedy given by that act? *id*

Decisions.

2. See *Vilas & Bacon* agt. *Jones & Percy*, 768

V

VARIANCE.

See INSURANCE COMPANIES—*Decisions* 1.

VOLUNTARY PAYMENT.

See ACTION—*Questions* 2—*Decisions* 2, 3.

VOLUNTARY SETTLEMENT.

See TRUST DEEDS—*Questions* 1-4—*Decisions* 1.

W

WAIVER.

See BILLS OF EXCHANGE AND PROMISSORY NOTES—*Questions* 3-8—*Decisions* 4.

WILL.

See EXECUTORS AND ADMINISTRATORS—*Questions* 1, 2, 3, 4, 5, 6—*Decisions* 1-11, 12, 13.

Questions.

1. Where the testator devised and bequeathed all of his farm of land, with all thereto belonging, with his house, barn, &c., to his two sons, John and George, their heirs and assigns forever, share and share alike, with all of his farming utensils, and also all his stock, of whatever nature then on his farm; to his son Lambert, he bequeathed \$3,000, to be paid within one year after his decease, by his two sons, John and George; to each of his three daughters, Mary, (called Dorothe,) Anne and Jane, he bequeathed the sum of \$700, also, to be paid by his said two sons, John and George, as they severally should become of age; to his wife, Dorothe, he gave the use and income of all his estate, during her widowhood; and, there being personal property amount-

ing to nearly \$6,000, not specifically disposed of by the will,

Whether, after the death of the widow, the appellants, as heirs at law, were entitled to an account of the reversionary interest in that part of the personal estate, not specifically bequeathed to the two sons, John and George, and payment of their shares therein as next of kin of the testator? *Hoes and wife, and others agt. Van Hoesen,* 271

2. Whether, by the construction of the will, the legacies (to the four children) were to be paid by the devisees *personally* on account of the devise of the *real estate* to them, or, whether the reversionary interest in the *personal estate* not specifically bequeathed, was the primary fund for their payment; and, which the devisees were authorized thus to appropriate? *id*

3. Whether releases each for \$700, executed by the appellants, (Mary and Anne,) for their legacies under the will, precluded them from claiming, as heirs at law, their share in the reversionary interest of the personal estate not specifically bequeathed? *id*

Decisions.

1. *Held*, that the personal estate of the testator is deemed the natural and primary fund, to be first applied in discharge of his personal debts and general legacies, and the testator is presumed to act upon this legal doctrine, until he shows some other distinct and unequivocal intention. *Hoes and wife, and others agt. Van Hoesen,* 282

2. It seems from the will, that it was the intention of the testator, that the devise and bequest to the two sons, with directions to them to pay, should be in *aid* of the reversionary interest in the personal estate undisposed of by the will, and that that interest should be the primary fund for the payment of the legacies. *id*

3. The mere making a provision for the payment of debts or legacies out of the real estate, does not discharge the personalty. There must be an intention not only to charge the realty, but to *exonerate* the personalty.

The decree affirmed upon this point alone. *id*

See PLEADINGS—Questions 5–10—Decisions 5.

Questions.

4. Whether a married woman, with the consent of her husband, could *by will* dispose of the proceeds of a *policy of insurance*, procured by her under the act of 1840, on the life of her husband, for her separate use? *Moehring* agt. *Thayer*, pub. adm'r., &c. 502

5. Whether such a will can be propounded, admitted to probate, and proved as a last will and testament? *id*

Decisions.

4. Decided on the ground "that the surrogate had no jurisdiction, under the statute, to take proof of the will of a married woman." *Moehring* agt. *Thayer*, pub. adm'r., 509

5. Whether a court of equity could give any effect to the paper, was not decided. (No written opinion.) *id*

See LEGACIES AND LEGATEES—Questions 1–7—Decisions 1.

WITNESS.

Questions.

1. A witness being offered on behalf of the plaintiff, and objected to on the ground of interest, and that interest being established by a witness sworn for that purpose, and the principal witness thereupon being released; whether the circuit judge properly allowed the defendants to impeach the *credibility* of the principal witness, by an examination of him (cross-examination,) upon the matters previously testified to by the witness called to prove his interest? *Wood*, ex'r. agt. *Weiant and others*, 155

2. Whether a witness called as a *mere witness*, and not as a *party* under the usury law, to prove, under the *plea of the general issue*, that a promissory note was *usurious* and *void*, was bound to answer, notwithstanding the objection, that his doing so might form a link in the chain of testimony tending to convict him of a misdemeanor, or expose him to a penalty or

forfeiture? *Bank of Salina* agt. *Pierce*, &c., 173

3. Whether under the notice annexed to the plea, in pursuance of the Usury Act of 1837, the defendant might prove by the witness, (who was not a party to the record,) that he was the "*plaintiff in interest*," and also the "*usurious agreement*" on discounting the note? Or, whether the fact that the witness was the plaintiff in interest, must not be proved by some other witness? *id*

4. Whether the statute of limitations, or the Usury Act of 1837, would be a protection to the witness on an indictment for usury, or in an action for a penalty or forfeiture? *id*

Decisions.

1. *Held*, that as the answer of the witness might tend to establish facts which would work a *forfeiture of the debt*, (1 R. S. 595, § 28,) he was not obliged to testify. This ground of itself was sufficient to establish the privilege of the witness; and, as to this, the statute of limitations had no application. *Bank of Salina* agt. *Pierce*, &c., 181

2. Besides, as to the grounds on which the privilege of the witness was put by the supreme court, the statute of limitations was not even mentioned on the trial. If the defendant intended to rely on this statute, he was at least bound to say so. A party is not at liberty to start a question, on a motion for a new trial, or in a court of review, which, had it been mentioned on the trial, might have received a satisfactory answer, (per BRONSON, J.) *id*

Questions.

5. Whether the *opinion* of a witness, to prove that certain matter published in a newspaper was "*the reports*" of the plaintiff, was competent evidence? The question was this:—"From that printed copy, can you state whose reports they were?" *Lee* agt. *Bennett*, 187

6. Whether the *evidence*, relied upon before the justice to *raise a promise* on the part of the defendant below, (Bennett, editor and proprietor of the *Herald*,) to pay the plaintiff, (Lee,) for reporting, was sufficient for that purpose? *id*

Decisions.

3. The supreme court *held*, (JEWETT, Justice, delivering the opinion,) that assuming that the defendant was the editor and proprietor of the New-York Herald, as the history of the trial showed that both parties did—it did not show any employment of the plaintiff, by the defendant, to render the services he claimed to have rendered; and that the justice correctly decided the case upon the evidence. *Lee* agt. *Bennett*, 202

4. The rule which requires witnesses to testify to facts from knowledge, and not from belief, justified the decision of the justice in excluding the question put to the witness Doyle, to-wit: "From that printed copy, can you state whose reports they were?" There are exceptions to this rule. On questions of skill and judgment, men of science and experience are allowed to give their opinion in evidence. (23 *Wend.* 425.) But this does not come within any exceptions to the rule *id*

5. In relation to the point that the justice erred in excluding the evidence as to the declarations of the foreman in the defendant's establishment—*held*, that it was necessary that it should have appeared in evidence, that he was the agent of the defendant, transacting business for him, and that such declarations were made in relation to that business, and while engaged in it. There being no such evidence, the evidence offered was properly excluded. *id*

Questions.

7. Whether an inhabitant of a school district, who has sent to school, and liable, consequently, to taxation, to raise funds to discharge the teacher's wages, has such an *interest* as to *disqualify* him from being a *witness* in an action brought to recover such wages? *Reynolds* agt. *Mynard and others*, 620

Decisions.

6. JEWETT, Ch. J., *held*, that the only interest which it was pretended *Adsit* or *Sprague* had, to be affected by the result of the suit, was, that the question to be decided, involved an increase or diminution of the funds of the district, so as to add to or lighten the burden of taxation upon them as individual members of the school district or corporation. It was well settled, that a mere liability to be rated or taxed, constitutes an interest too remote and contingent to operate as the ground of exclusion. *Reynolds* agt. *Mynard and others*, 628

7. These individuals were in no sense parties to the record; and, therefore, could not be, affected by the result, either as individuals or corporators. *id*

8. JOHNSON, J., *held*, that if the case had clearly shown (which it did not) the liability of *Adsit* and *Sprague* for the teachers' wages, they were still competent witnesses, as the objection only went to their *credibility*. They had no immediate and direct interest in the judgment rendered. It could not be given in evidence in their favor, nor against them in any subsequent suit. *id*

WRIT OF ERROR.

Questions.

1. Whether, where a matter of *fact*, pleaded by defendants in error, in the supreme court, in bar of the plaintiff's right to maintain his writ of error, being found for the plaintiff, the defendants in error, notwithstanding there was no joinder in error, had a right to be heard upon the whole matter on the record? *Hymann* agt. *Cook and others*, 419

Decisions.

1. See *Hymann* agt. *Cook and others*, 447

